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(2)

No.

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

JEREMY FLAX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

In the
Supreme Court
of Tennessee
At Nashville

No. M2005-01768-SC-R11-CV

JEREMY FLAX et al. v. DAIMLERCHRYSLER CORPORATION et al.

Appeal by Permission from the Court of Appeals, Middle Section Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr., Judge

October 25, 2007 Session Heard at Maryville[1]

Filed July 24, 2008

[1] Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

The plaintiffs filed this products liability case against DaimlerChrysler seeking damages for the wrongful death of their son and for emotional distress suffered by the mother. The plaintiffs also sought punitive damages. We granted review to determine: 1) whether a negligent infliction of emotional distress claim brought simultaneously with a wrongful death claim is a "stand-alone" claim that requires expert medical or scientific proof of a severe emotional injury; 2) whether the evidence presented at trial was sufficient to support an award of punitive damages; 3) whether the punitive damages awarded by the trial court were excessive; and 4) whether the trial court erred by recognizing the plaintiffs' second failure to warn claim. We hold that the simultaneous filing of a wrongful death suit does not prevent a negligent infliction of emotional distress claim from being a "stand-alone" claim. Therefore, negligent infliction of emotional distress claims brought under these circumstances must be supported by expert medical or scientific proof of a severe emotional injury. In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Finally, we hold that the trial court erred by recognizing the plaintiffs' second failure to warn claim but conclude that the error did not prejudice the judicial process or more probably than not affect the jury's verdict. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on the negligent infliction of emotional distress claim and reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Affirmed in Part and reversed in Part

JANICE M. IIOLDER, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., joined. CORNELIA A. CLARK, J., concurring in part and dissenting in part. GARY R. WADE, J., concurring. WILLIAM C. KOCH, JR., J., concurring in part and dissenting in part.

Alan J. Hamilton, George W. Fryhofer, III, James E. Butler, Jr., and Leigh Martin May, Atlanta, Georgia, and Gail Vaughn Ashworth, Nashville, Tennessee, fro the Appellants, Jeremy Flax and Rachel Sparkman.

Dominic Lanza and Theodore J. Boutrous, Jr., Los Angeles, California; James C. Ho, Dallas, Texas; Thomas H. Dupree, Jr., Washington, D.C.; and Joy Day and Lawrence A. Sutter, Franklin, Tennessee, for the Appellee, DaimlerChrysler Corporation.

Louis A. Stockell, Jr., Madison, Tennessee, Pro Se.

Allison Orr Larsen, K. Lee Blalack, II, and Matthew M. Shors, Washington, D.C., for the Amicus Curiae, Alliance of Automobile Manufacturers.

Christopher Landau and Robin S. Conrad, Washington, D.C., and John Randolph Bibb, Jr., Nashville, Tennessee, for the Amicus Curiae, The Chamber of Commerce of the United States of America.

Jonathan M. Hoffman, Portland, Oregon, and Linda J. Hamilton Mowles, Knoxville, Tennessee, for the Amicus Curiae, The Product Liability Advisory Council, Inc.

OPINION

I. FACTS AND PROCEDURAL HISTORY

On June 30, 2001, Rachel Sparkman and her eight-month-old son, Joshua Flax, were passengers in a 1998 Dodge Grand Caravan ("the Caravan") operated by Ms. Sparkman's father, Jim Sparkman. Ms. Sparkman was seated in a captain's chair directly behind the driver's seat. Joshua Flax was restrained in a child safety seat in the captain's chair directly behind the front passenger's seat, which Joe McNeil occupied.

As Mr. Sparkman turned left from a private drive onto a public road, the Caravan was rear-ended by a pickup truck driven by Louis Stockell. According to the testimony of the accident reconstruction experts, the pickup truck was traveling between fifty and fifty-six miles per hour at the time of impact. The Caravan was traveling in the same direction at a speed between ten and fifteen miles per hour. At the moment of the impact, the Caravan experienced a change in velocity of approximately seventeen to twenty-three miles per hour. Accident reconstruction experts for both parties testified that Mr. Sparkman was not responsible for the accident and that the accident would not have occurred if Mr. Stockell had not been driving at an excessive speed.[2]

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[2] The plaintiffs' expert testified that Mr. Stockell originally was traveling at approximately sixty miles per hour, and the defendant's expert testified that Mr. Stockell was traveling at approximately seventy miles per hour. The posted speed limit on the public road at the time of the accident was thirty-five miles per hour.

Upon impact, the backs of the seats containing Mr. Sparkman, Ms. Sparkman, and Mr. McNeil yielded rearward into a reclining position. Tragically, the front passenger's seatback collapsed far enough to allow the back of Mr. McNeil's head to collide with Joshua Flax's forehead. The collision fractured Joshua Flax's skull and caused severe brain damage. None of the other passengers in the Caravan suffered serious injuries. Experts for both parties acknowledged that Joshua Flax would not have been seriously injured if the seat in front of him had not yielded rearward.

Immediately after the Caravan came to a rest, Ms. Sparkman checked on her son's condition and saw that his forehead had been, in her words, "smashed in." Michael Loftis, one of the first people to arrive at the scene of the accident, testified that he saw Ms. Sparkman outside the vehicle holding Joshua Flax. Because he believed Ms. Sparkman was "kind of hysterical" and could have accidentally caused further injury to Joshua Flax, Mr. Loftis offered to hold the child. Although initially reluctant, Ms. Sparkman agreed to give her son to Mr. Loftis. At this point, Mr. Loftis first observed that Joshua Flax had "a hole in his forehead approximately the size of a golf ball and probably a half inch deep." A short time later, Joshua Flax was transported to the hospital by ambulance. He died of his injuries the next day.

On May 7, 2002, Ms. Sparkman and Joshua Flax's father, Jeremy Flax, filed a complaint against

Mr. Stockell[3] and DaimlerChrysler Corporation ("DCC"), the manufacturer of the Caravan. The complaint alleged that the Caravan's seats are defective and unreasonably dangerous, that DCC failed to warn consumers that the seats pose a danger to children seated behind them, and that DCC is strictly liable under the Tennessee Products Liability Act of 1978. Tenn. Code Ann. §§ 29-28-101 to -108 (2000). The plaintiffs further alleged that the condition of the seats and the failure to warn proximately caused Joshua Flax's death and caused Ms. Sparkman to suffer severe emotional distress. Finally, the plaintiffs alleged that punitive damages are warranted because DCC acted intentionally and recklessly in manufacturing, marketing, and selling the Caravan.

After a lengthy trial, the jury found that the seats were defective and unreasonably dangerous, that DCC failed to warn the plaintiffs about the dangers of the seats at the time of sale, that DCC failed to warn plaintiffs about the dangers of the seats after the sale, and that DCC acted recklessly such that punitive damages should be imposed. The jury apportioned half of the fault to DCC and the other half to Mr. Stockell. Finally, the jury awarded

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[3] Mr. Stockell failed to attend his scheduled deposition and failed to respond to DaimlerChrysler's interrogatories and request for production of documents. As a sanction, Mr. Stockell was prohibited from testifying at trial and from raising a defense against the plaintiffs' claims. In addition, the trial court instructed the jury that Mr. Stockell was at fault. Mr. Stockell is not a party to this appeal, and neither party has appealed any findings of fact or conclusions of law with respect to Mr. Stockell.

$5,000,000 to the plaintiffs for the wrongful death of Joshua and $2,500,000 to Ms. Sparkman individually for negligent infliction of emotional distress ("NIED").

After the second stage of the trial, the jury awarded $65,500,000 in punitive damages to the plaintiffs for the wrongful death of Joshua Flax and $32,500,000 in punitive damages to Ms. Sparkman individually for NIED. Following the jury's verdict, the trial court conducted a review of the jury's award of punitive damages as required by Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992). In its findings of fact and conclusions of law the trial court concluded that "the jury properly found that Daimler Chrysler [sic] acted recklessly and that punitive damages were warranted." The trial court also concluded that the jury's award of punitive damages was excessive because there was a very large discrepancy between the punitive damages, totaling $98,000,000, and the compensatory damages for which DCC was liable, totaling $3,750,000. Accordingly, the trial court reduced the punitive damages to $20,000,000, a remittitur of $78,000,000. In its final order, the trial court indicated that the plaintiffs were entitled to $13,367,345 in punitive damages for the wrongful death of Joshua Flax and that Ms. Sparkman was individually entitled to $6,632,655 in punitive damages for NIED.

On appeal, the Court of Appeals concluded that Ms. Sparkman's NIED claim was subject to the heightened proof requirements set forth in Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996). The Court of Appeals reversed the jury's award of compensatory and punitive damages related to Ms. Sparkman's NIED claim against DCC because

the plaintiffs did not satisfy the heightened proof requirements for a "stand-alone" NIED claim. In addition, the Court of Appeals concluded that there was not clear and convincing evidence that DCC acted recklessly or intentionally. Accordingly, the Court of Appeals reversed the trial court's award of all remaining punitive damages. Finally, the Court of Appeals affirmed the trial court's award of $5,000,000 in compensatory damages for the wrongful death of Joshua Flax. The plaintiffs appealed the ruling of the Court of Appeals. We granted review.

II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

We begin our analysis with Ms. Sparkman's NIED claim. Our modern jurisprudence concerning NIED began with Camper. In that case, the plaintiff was operating a cement truck when a vehicle operated by the defendant pulled in front of him. The defendant was killed immediately in the resulting collision. Although the plaintiff suffered only minor physical injuries, he filed an NIED claim alleging that he suffered emotional injuries from viewing the defendant's body immediately after the accident.

We began our analysis in Camper by recognizing that the law governing NIED

> is fundamentally concerned with striking a balance between two opposing objectives: first, promoting the underlying purpose of negligence law–that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial

> or fraudulent claims that have been thought to be inevitable due to the subjective nature of these injuries.

Id. at 440. We then catalogued a variety of approaches used in other jurisdictions to meet these two opposing goals. Some jurisdictions held that a plaintiff could not recover for NIED unless he or she suffered a "physical impact" caused by the defendant's negligent conduct. Id. Other jurisdictions allowed a plaintiff to recover for NIED if the plaintiff suffered a "physical manifestation" of the emotional injury. Id. at 442. Still other jurisdictions required that the plaintiff be in the "zone of danger" created by the defendant's negligent conduct. Id.

Prior to our decision in Camper, Tennessee applied a version of the "physical manifestation" rule. Id. at 443; see also Memphis State Ry. Co. v. Bernstein, 194 S.W. 902, 902 (Tenn. 1917). Unfortunately, the "physical manifestation" rule discouraged compensation for some meritorious claims by "ignor[ing] the fact that some valid emotional injuries simply may not be accompanied by a contemporaneous physical injury or have physical consequences." Camper, 915 S.W.2d at 446. Accordingly, Tennessee courts had "continually found it necessary to deviate from the 'physical manifestation' rule by either formally creating exceptions to the rule or by applying the rule in a nonrigorous fashion." Id. at 445. To increase the fairness, clarity, and predictability of the law governing NIED, we abandoned the "physical manifestation" rule and adopted new requirements designed to distinguish between meritorious and frivolous cases. Id. at 446. Specifically, we held that

a plaintiff who has not suffered a physical injury must demonstrate through expert medical or scientific proof that he or she has suffered a "severe" emotional injury. Id. We held that an emotional injury is "severe" if "'a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" Id. (quoting Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)). Our holding in Camper therefore balances the goals of compensating victims and avoiding fraudulent claims by: 1) allowing a person with emotional injuries to bring NIED claims regardless of whether he or she has suffered any physical injury, and 2) requiring a higher degree of proof for emotional injuries under these circumstances.

In Ramsey v. Beavers, 931 S.W.2d 527, 530-31 (Tenn. 1996), we reaffirmed the principles set forth in Camper, rejected the argument that the "zone of danger" test could be integrated into our Camper analysis, and held that a plaintiff who saw his mother hit by a car could bring a suit for NIED regardless of whether he was physically injured or placed in immediate danger of being physically injured. Id. We emphasized that to prove his claim the plaintiff was required to present expert medical or scientific evidence that he had suffered a severe emotional injury. Id. at 532. In addition, we held that to recover for emotional injuries sustained as the result of the death or injury of a third party a plaintiff must establish: 1) that he or she was sufficiently near the injury-causing event to allow sensory observation of the event, and 2) that the

injury was, or was reasonably perceived to be, serious or fatal.[4] Id. at 531.

We further clarified our holding in Camper in Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001). Amos involved a plaintiff who was infected with HIV during a blood transfusion. The plaintiff received no notice of the possibility that she had been exposed to HIV. Years later, the plaintiff gave birth to a daughter who was infected with HIV in utero. After her daughter died of an AIDS-related virus, the plaintiff was tested and learned that she had HIV. The plaintiff and her husband filed suit for wrongful birth, negligence, and NIED.

The defendants in Amos cited Camper and argued that the plaintiff was not entitled to recover for emotional injuries because she had failed to present expert or scientific testimony of serious or severe emotional injury. We rejected this argument and held that "[t]he special proof requirements in Camper are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims." Amos, 62 S.W.3d at 136-37. Because "the risk of fraudulent claims is less . . . in a case in which a claim for emotional injury damages is one of multiple claims for damages[,]" we held that the heightened proof requirements set forth in Camper are inapplicable "[w]hen emotional damages are a 'parasitic' consequence of negligent

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[4] Our opinion in Ramsey stated that the closeness of the relationship between the plaintiff and the third party is relevant, but we stopped short of requiring plaintiffs to prove that a close relationship existed. 931 S.W.2d at 531-32; accord Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 54 (Tenn. 2004).

conduct that results in multiple types of damages." Id. at 137. In other words, we recognized a distinction between traditional negligence claims that include damages for emotional injuries and claims that are based solely on NIED.

The plaintiff in Amos alleged that she had suffered emotional injuries caused by her infection with HIV and by the subsequent infection of her daughter. Because the plaintiff's claim of emotional damages was not separate from her other claims of negligence, but rather was "parasitic" to those claims, her claim was properly characterized as a negligence claim that included damages for emotional injuries. As her claim was not based solely on NIED, we concluded that the proof requirements of Camper were inapplicable. Id.

With this history in mind, we now turn to the facts of the instant case. At trial, the plaintiffs failed to present expert medical or scientific proof that Ms. Sparkman suffered severe emotional injuries. DCC filed motions for directed verdict and judgment notwithstanding the verdict, arguing that Ms. Sparkman's NIED claim was invalid because plaintiffs failed to meet the Camper requirements. Plaintiffs argued that the heightened proof requirements of Camper were inapplicable because Ms. Sparkman's NIED claim was filed with a wrongful death claim and was therefore not a "stand-alone" claim. The trial court agreed with the plaintiffs and upheld the jury's verdict with respect to Ms. Sparkman's NIED claim.

On appeal, the plaintiffs continue to argue that the NIED claim is not a "stand-alone" claim because the plaintiffs also brought a wrongful death suit on behalf of Joshua Flax. We disagree. It is well settled

that a wrongful death action is a claim belonging to the decedent, not the decedent's beneficiaries. Ki v. State, 78 S.W.3d 876, 880 (Tenn. 2002); see also Tenn. Code Ann. § 20-5-106 (Supp. 2006). "Although the living beneficiaries of the action may seek a limited recovery for their own losses in addition to those of the decedent, the right of action itself remains one that is 'single, entire[,] and indivisible.'" Kline v. Eyrich, 69 S.W.3d 197, 207 (Tenn. 2002) (alteration in original) (citations omitted) (quoting Wheeler v. Burley, No. 01A01-9701-CV-00006, 1997 WL 528801, at *3 (Tenn. Ct. App. Aug. 27, 1997)). Accordingly, the wrongful death claim in the instant case belongs to Joshua Flax rather than to the plaintiffs.

This case is therefore distinguishable from Amos, a case in which the plaintiff sought to recover for emotional damages parasitic to negligence and wrongful birth claims that were personal to the plaintiff. See Smith v. Gore, 728 S.W.2d 738, 741 (Tenn. 1987) (holding that wrongful birth actions are actions by parents "on their own behalf"). Nothing in our opinion in Amos was intended to allow plaintiffs to avoid the heightened proof requirements of Camper by bringing a separate wrongful death suit on behalf of a decedent. Because Ms. Sparkman's NIED claim is the only claim that is personal to one of the plaintiffs, we must conclude that it is a "stand-alone" claim subject to the requirements of Camper.

Furthermore, this case is not meaningfully distinguishable from our decision in Ramsey, a case in which the plaintiff saw his mother killed when she was hit by a car. We held that to recover for emotional injuries sustained as the result of the death or injury of a third party a plaintiff must

present expert medical or scientific proof of a severe emotional injury and establish proximity to the injury-causing event and severity of the injury to the third party. Ramsey, 931 S.W.2d at 531-32. Like the plaintiff in Ramsey, Ms. Sparkman seeks to recover for emotional injuries sustained as a result of witnessing the death of an immediate family member. That the plaintiffs in this case brought a wrongful death suit is not sufficient to exempt the NIED claim from the requirements set forth in Camper and Ramsey because the filing of a wrongful death suit does nothing to demonstrate the reliability of an NIED claim.

The plaintiffs also argue that the NIED claim is valid because Ms. Sparkman suffered minor physical injuries in the accident but chose not to bring a claim for those injuries. This argument has two flaws. First, the plaintiff in Camper also suffered minor injuries for which he did not file a claim. 915 S.W.2d at 439 (quoting the plaintiff's testimony that he suffered a scrape on his knee in the accident). Clearly, the plaintiff's minor injury in Camper did not prevent us from concluding that heightened proof requirements are necessary for NIED claims. See id. at 446. Second, the emotional injuries alleged by Ms. Sparkman are not parasitic to the minor injuries she sustained in the accident but rather are the result of witnessing the death of her child. Even if Ms. Sparkman had chosen to bring a claim for her minor physical injuries, her NIED claim would remain a "stand-alone" claim because the emotional injuries sustained from witnessing the death of her child are completely unrelated to any physical injuries she may have sustained. Of course, Ms. Sparkman would not have been required to meet the Camper requirements to recover for any mental

and emotional suffering resulting from her own physical injuries. See Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999) (holding that damages for pain and suffering in a personal injury case may include a variety of mental and emotional injuries that accompany the physical injury). When a plaintiff suffers a physical injury there is some indication that allegations of emotional and mental injuries resulting from that injury are not fraudulent. See Amos, 62 S.W.3d at 137. On the other hand, having a potential claim for physical injuries does nothing to ensure the reliability of an NIED claim relating to the emotional injuries resulting from witnessing the death or injury of a third party. Accordingly, there is no good reason to relieve Ms. Sparkman of her burden of meeting the Camper requirements.

Finally, the plaintiffs argue that the heightened proof requirements of Camper are unnecessary in this case because the severity of Ms. Sparkman's emotional injuries is obvious. Although it is axiomatic that witnessing the death of one's child is a horrific experience, it is not at all obvious what impact such an event will have on any particular individual. Indeed, we constructed the Camper requirements precisely because emotional injuries are uniquely subjective. 915 S.W.2d at 440; Amos, 62 S.W.3d at 137. Although sympathy for a particular plaintiff may tempt us to hold that certain circumstances "obviously" result in severe emotional injuries, we must also recognize that such a holding would subvert the principles set forth in Camper and would likely lead to the kind of ad hoc decisions that originally made NIED case law unpredictable and incoherent. Furthermore, we do not believe the requirement that a severe emotional injury be

proven by expert medical or scientific evidence is unduly burdensome to those plaintiffs who have suffered legitimate "stand-alone" emotional injuries. Accordingly, we decline to create an exception to the Camper requirements based on the particular circumstances of this case.

Based on the foregoing considerations, we hold that Ms. Sparkman's NIED claim was governed by the heightened proof requirements of Camper. It is uncontested that Ms. Sparkman failed to meet those requirements. We therefore affirm, albeit under slightly different reasoning, the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim.

III. PUNITIVE DAMAGES

Several issues relating to punitive damages have been hotly contested throughout the trial and appeal of this case. DCC continues to assert three arguments against the validity of the punitive damages awarded for the wrongful death of Joshua Flax. First, DCC argues that punitive damages are not warranted in this case because the evidence was insufficient to support a finding of recklessness. Second, DCC argues that the award of punitive damages is excessive in violation of the due process standards announced by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). Finally, DCC argues that the trial court violated the due process requirements of Phillip Morris USA v. Williams, ___ U.S. ___, 127 S. Ct. 1057 (2007), by allowing the jury to consider harm to non-parties when determining the amount of punitive damages

to impose against DCC. We address each of these arguments in turn.

a) Sufficiency of Evidence Supporting Jury's Finding of Recklessness

DCC argues that the evidence submitted by the plaintiffs was insufficient to support the imposition of punitive damages. A verdict imposing punitive damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). In Hodges, we held that evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." Id. at 901 n.3. We also held that a person acts recklessly when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Id. at 901. The jury in this case found that there was clear and convincing evidence that DCC's conduct was reckless.

When this Court is called upon to review the reasonableness of a jury's verdict, as we are in this case, we "are limited to determining whether there is material evidence to support the verdict." Id. at 898. In making this determination, we do not re-weigh the evidence. Elec. Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522, 526 (Tenn. 1985). Rather, we are "required to take the strongest legitimate view of all of the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to

the contrary." Id. The jury's verdict must be affirmed if any material evidence supports it. Id. Therefore, our review of this issue is limited to determining whether any material evidence supports the jury's conclusion that there is no serious or substantial doubt that DCC consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs.

To determine whether there is any material evidence supporting the jury's verdict, we must summarize the evidence presented at trial in some detail. At trial, the plaintiffs sought to prove that DCC had known for over twenty years that its seats were defective and unreasonably dangerous but failed to remedy the problem or warn consumers of the danger. DCC countered by arguing that it designed the seats to yield rearward in rear-end collisions to absorb energy from the collision and protect the occupant of the seat. According to DCC, the Caravan design protects the greatest number of people in the greatest number of potential accidents and using stronger seatbacks would increase the danger to occupants of the seat. To further support its argument that its seat design was reasonably safe, DCC repeatedly noted that its seatbacks were similar to those used by other manufacturers and exceeded the federal regulation governing seatback strength, Federal Motor Vehicle Safety Standard 207 ("FMVSS 207").

As part of their effort to demonstrate that the Caravan's seatbacks posed a substantial and unjustifiable risk, the plaintiffs introduced the testimony of Dr. Saczalski, an expert on seat engineering. Dr. Saczalski testified that the Caravan's seats were defective and unreasonably

dangerous because they posed a threat to children seated behind them. His testimony was based in part on crash testing he conducted in an attempt to recreate the accident underlying this case. During the crash test, Dr. Saczalski used vehicles of the same make and model as those involved in the accident and attempted to account for the weight, speed, and trajectory of each vehicle. The Caravan used in the crash test contained dummies approximating the size and weight of Mr. Sparkman, Mr. McNeil, Ms. Sparkman, and Joshua Flax. Dr. Saczalski replaced the driver's seat of the Caravan with a seat from a 1996 Chrysler Sebring, a DCC vehicle that had seats with backs approximately five times stronger than the seats used in the Caravan. Dr. Saczalski placed the Sebring seat in the crash test vehicle to demonstrate how a stronger seatback would perform under forces equivalent to those suffered by the Caravan in the actual accident.

Consistent with the circumstances of the actual accident, videos of the crash test show that the front passenger's seat yielded rearward allowing the McNeil surrogate's head to impact the head of the Joshua Flax surrogate. The Sebring seat also yielded rearward but to a far lesser degree. Significantly, the Sebring seat did not substantially encroach upon the seating area behind it. Dr. Saczalski concluded from the crash test that Joshua Flax would have survived the accident without serious injury had the Caravan been equipped with seats with backs as strong as those of the Sebring seat. Contrary to DCC's assertion that stronger seatbacks impose greater dangers to their occupants in rear-end collisions, the crash test dummy in the stronger Sebring seat experienced less

head and neck acceleration than the dummy in the Caravan seat.

Dr. Saczalski also testified regarding several other crash tests he performed in which Sebring seats were placed side-by-side with other DCC minivan seats. These tests also demonstrated that DCC minivan seats have the capacity to cause injury to children seated behind them. The test results support the view that Sebring seats do not pose the same threat because they do not encroach upon the passenger space behind them. Furthermore, Dr. Saczalski testified that the dummy-occupants of the stronger Sebring seats tended to experience less acceleration to the head and neck than the dummy-occupants of weaker seats.

The plaintiffs also made a considerable effort to demonstrate that DCC was aware that the Caravan seats were defective and unreasonably dangerous for at least twenty years. The minutes from a DCC Engineer Safety Committee meeting dated December 10, 1980, appear to contain the first acknowledgment that yielding seatbacks could be a potential problem. In the meeting it was noted that the seatbacks had yielded to some degree in every crash test and that "improvements could be made, but would require development costs and a piece penalty would result." The Engineer Safety Committee did not make any recommendation to improve seatback strength because the seats performed as well as those of DCC's competitors, complied with federal requirements, and had not been demonstrated "to be a significant injury producing problem." Videos of crash testing performed by DCC confirm that in rear-impact collisions the seats yielded into the occupant space behind them. In addition, plaintiffs presented

documentation showing that in at least one crash test conducted in 1989 the front seats were braced to prevent the seatbacks from impacting equipment occupying the back seat.

Although the minutes from the 1980 meeting indicate that there was no evidence that the seats were a "significant injury producing problem," DCC soon began to receive new information. According to an employee in DCC's customer relations department, during the mid-1980s, DCC began to receive reports of children injured by yielding seatbacks in rear-end collisions. DCC's records contained documentation of several rear-end collisions in which a yielding seatback caused a child to suffer skull or facial fractures. Other injuries sustained by children seated behind yielding seatbacks were also reported to DCC. In spite of these reports, DCC did not issue any warning to customers and continued to advertise the Caravan as a vehicle specifically designed to protect children.

The most significant testimony regarding DCC's knowledge of the danger presented by the Caravan seats was provided by Paul Sheridan, a former DCC employee. During his employment with DCC, Mr. Sheridan served as the chair of the Minivan Safety Leadership Team ("MSLT"), a committee formed to address safety concerns in DCC's minivans. The committee was comprised of persons from DCC's safety, engineering, marketing, sales, and design departments. One of the many safety issues the MSLT was formed to address was the issue of seatback strength. According to Mr. Sheridan, the MSLT had available to it complaints regarding injuries caused by yielding seatbacks. At a March 16, 1993, committee meeting,

members of the MSLT reached a consensus that it was unacceptable for seats to yield rearward into the passenger space behind them and that the seats were inadequate to protect customers. After the meeting, Mr. Sheridan distributed the minutes of the meeting to various DCC executives. Some time thereafter, Ronald Zarowitz, a member of the MSLT representing DCC's safety office, instructed Mr. Sheridan to retrieve the minutes of the meeting and destroy them. Mr. Zarowitz informed Mr. Sheridan that this order came from Francois Castaing, the head of the engineering department. Mr. Sheridan retrieved the minutes as instructed, but he retained two copies in his office.

After the March 1993 meeting, Mr. Sheridan decided to investigate the seatback issue further. To this end, Mr. Sheridan met with an engineer responsible for seat design and requested the seat design specifications that discussed how the seats were designed to yield. According to Mr. Sheridan, the engineer "didn't know what [he] was asking for" but provided the design specifications of the seats. These specifications did not state that the seats were designed to yield. In fact, Mr. Sheridan testified that he never heard any engineer state that seatbacks were designed to yield rearward as a safety precaution. In September 1994, Mr. Sheridan told his supervisor that he was going to go to regulators with his concerns about the minivan seatbacks. In November 1994, the MSLT was disbanded at the direction of Ted Cunningham, the executive with authority over minivan operations. Mr. Sheridan was fired on December 27, 1994, and the minutes

from the March 1993 MSLT meeting and the seat design specifications were confiscated from his office.[5]

We find little support in the record for Justice Koch's speculation that Mr. Sheridan's testimony "may very well reflect DaimlerChrysler's over-reaction to the Sixty Minutes story and the existence of some internal dissension regarding how best to respond to the concerns about car seat safety raised by the story." In fact, this characterization of Mr. Sheridan's testimony appears to have been rejected by the jury, which heard his testimony and was charged with resolving issues of credibility. Moreover, DCC presented no testimony that the formation of the MSLT was an "over-reaction," and it is clear from Mr. Sheridan's testimony that he believed the MSLT was necessary to address serious safety concerns. DCC's efforts to destroy the recommendations produced by the MSLT are a further indication of DCC's awareness of the seat-back problem and its determination to hide the problem rather than solve it. In our minds, this represents more than "some internal dissension regarding how best to respond to the concerns about car safety."

Justice Koch's efforts to discount Mr. Sheridan's testimony are inconsistent with our standard of review on appeal. The jury apparently accredited much of Mr. Sheridan's testimony, and, as we have stated, we are required to view his testimony in the

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[5] Those documents are not included in the record before us. The plaintiffs allege that the documents were not produced during discovery.

light most favorable to the jury's verdict and assume the truth of his assertions that support the jury's verdict. Elec. Power Bd. of Chattanooga, 691 S.W.2d at 526. We therefore must assume that Mr. Sheridan was truthful when he denied leaking confidential information to Auto World magazine. We must also make the reasonable inference that Mr. Sheridan in fact was fired because he threatened to go to regulators with his safety concerns. In addition, whether Mr. Sheridan has been excluded from testifying in other cases is irrelevant to our review. The trial court denied DCC's motion to exclude Mr. Sheridan's testimony, and DCC has not appealed that aspect of the trial court's ruling. The actions of another court have no impact on our review of the testimony accredited by the jury.

The plaintiffs also sought to demonstrate that compliance with FMVSS 207 was insufficient to make the Caravan seats reasonably safe. A seat engineer employed by DCC testified that FMVSS 207 requires "inadequate seat strength to insure that the seat does not fail when the car is subject to severe rear impact." In addition, Mr. Sheridan testified that members of the MSLT agreed that compliance with FMVSS 207 was insufficient to ensure safety of consumers. Furthermore, both of DCC's experts on seat design agreed that compliance with FMVSS 207 alone is inadequate to protect passengers.

Finally, the plaintiffs argued that stronger seatbacks would not result in greater injuries to occupants of the seats. Specifically, the plaintiffs claimed that the Sebring seat, which was approximately five times stronger than the Caravan seat, was a reasonably safe seat. The results of Dr. Saczalski's crash testing provide some evidence

that the Sebring seat offered a reasonable level of protection to its occupants. In addition, one of DCC's experts on seatback engineering agreed that the Sebring seat was a reasonably safe seat.

In summary, the jury's finding that the Caravan seats posed a substantial and unjustifiable risk to consumers was supported by: 1) expert testimony that the seats were defective and unreasonably dangerous; 2) crash tests demonstrating that the yielding seatbacks consistently encroached upon the occupant space behind them; 3) Mr. Sheridan's testimony that safety officials and engineers employed by DCC believed that the Caravan's seats were unacceptably dangerous; and 4) crash test evidence and expert testimony that Joshua Flax would not have been killed had a stronger seat been in place. The jury's finding that DCC consciously disregarded the risks posed by the Caravan seats was supported by: 1) minutes of DCC meetings noting that seats yielded; 2) DCC crash tests demonstrating that seats consistently encroached upon the passenger space behind them; 3) DCC records of injuries caused by yielding seatbacks; and 4) Mr. Sheridan's testimony that executives ignored the MSLT's warning that the seatbacks were unacceptably dangerous. We conclude that this evidence adequately supports the jury's conclusion that there is no serious or substantial doubt that DCC consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs. The evidence that DCC executives failed to heed the warnings of the MSLT and ordered the destruction of the committee's findings is particularly compelling. Not only did DCC fail to warn customers or redesign its product, DCC hid the evidence and continued to market the Caravan as a vehicle that put safety first.

Because the jury's verdict is supported by clear and convincing material evidence, we must affirm the jury's finding of recklessness. Elec. Power Bd. of Chattanooga, 691 S.W.2d at 526.

DCC's argument that risks associated with the Caravan seats were justified by the need for the seat to absorb energy from the collision and protect seat occupants is of no avail. This argument was presented to the jury, and the jury was apparently unconvinced by it. The jury could have reasonably accredited Mr. Sheridan's testimony that the seats were not intentionally designed to yield as a safety mechanism. The jury also could have reasonably concluded from testimony regarding the Sebring seat that seats need not yield as dramatically as the Caravan seats to protect seat occupants. DCC's argument that there is an ongoing debate regarding the optimum level of seatback strength is also without merit. The jury could have reasonably concluded that such a debate exists and simultaneously found that the Caravan's seats were weak enough to fall outside the range of reasonable debate.

With regard to DCC's proposed justification, Justice Koch fails to give proper deference to the jury's conclusions. He concludes that a "genuine principled debate" concerning the proper seatback strength led DCC to design "the front seats of the minivan to yield in a controlled manner in the event of a rear impact." Whether the seats were designed to yield "in a controlled manner" was contested at trial. The jury, apparently convinced by the accident reconstruction, the expert testimony, DCC's crash tests, and Mr. Sheridan's testimony, concluded that the manner in which the seats yielded was

unreasonably dangerous and that DCC recklessly disregarded the danger to its customers. While Justice Koch may disagree with that conclusion, this Court is not free to reweigh the evidence or second-guess the jury's conclusions when they are supported by material evidence.

We are also unconvinced by DCC's arguments that compliance with federal regulations and custom within an industry should bar the recovery of punitive damages. It is true that compliance with FMVSS 207 entitled DCC to a rebuttable presumption that its product was not unreasonably dangerous. Tenn. Code Ann. § 29-28-104. It is equally true, for the reasons stated above, that the evidence in this case thoroughly rebutted that presumption. Tennessee Code Annotated section 29-28-104 was designed "'to give refuge to the manufacturer who is operating in good faith and [in] compliance of what the law requires him to do.'" Tuggle v. Raymond Corp., 868 S.W.2d 621, 625 (Tenn. Ct. App. 1992) (alteration in original). The statute was not designed to provide immunity from punitive damages to a manufacturer who is aware that compliance with a regulation is insufficient to protect users of the product. While evidence of compliance with government regulations is certainly evidence that a manufacturer was not reckless, it is not dispositive. See O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987); Silkwood v. Kerr-McGee Corp., 769 F.2d 1451, 1457-58 (10th Cir. 1985); Dorsey v. Honda Motor Co., 655 F.2d 650, 656 (5th Cir. 1981). To hold otherwise would create an overly inflexible rule that would allow some manufacturers knowingly engaged in reprehensible conduct to escape the imposition of punitive damages.

Similarly, if a manufacturer knows that a common practice in an industry presents a substantial and unjustifiable risk to consumers, then compliance with the common practice is not an absolute bar to the recovery of punitive damages. Cf. Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F 3d 288, 300-01 (6th Cir. 2007) (applying Tennessee law and concluding that compliance with federal regulations and common industry practices is evidence of the standard of care but does not conclusively establish the standard of care in negligence cases). Evidence that a manufacturer consciously disregarded substantial and unjustifiable risks to the public can, in some rare cases, overcome evidence that the manufacturer's practice was common in the industry. This is such a case. Because the jury could have reasonably concluded from the evidence presented that DCC was aware that compliance with the FMVSS 207 and the industry standard for seat design was insufficient, we hold that punitive damages were not barred in this case.

b) Due Process Concerns and the Excessiveness of the Punitive Damage Award

Having concluded that punitive damages were warranted in this case, we now review whether the size of the punitive damage award is excessive in violation of the due process standards announced by the United States Supreme Court in Gore and Campbell. We begin our analysis of this issue by reviewing the United States Supreme Court's punitive damage jurisprudence.

In Gore, the United States Supreme Court was called upon to determine the constitutionality of a punitive damage award. The Court concluded that

due process requires that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Gore, 517 U.S. at 574. Accordingly, the Court adopted three guideposts for determining whether a defendant has adequate notice of the magnitude of the sanction that may be imposed. The first and most important guidepost is the reprehensibility of the defendant's conduct. Id. at 575. The Court indicated that the presence of violence, deceit, reckless disregard for the safety of others, or repeated misconduct may be aggravating factors that increase the reprehensibility of the defendant's conduct. Id. at 575-76. The second guidepost is the ratio between the punitive damage award and the actual harm suffered by the plaintiff. Id. at 580. Although the Court declined to adopt any strict mathematical formula, it repeated the suggestion from a previous case that "a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line'" of constitutional impropriety. Id. at 581-82 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991)). The final guidepost requires courts to compare the punitive damage award to civil or criminal penalties that could be imposed for similar conduct. "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'" Id. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). These legislative judgments are relevant because they provide defendants with notice of the severity of the

penalty that may be imposed upon them. See id. at 584.

The United States Supreme Court next considered the due process requirements for punitive damages in Campbell. The Court again observed that the reprehensibility of the defendant's conduct is the most important guidepost. Campbell, 538 U.S. at 419. In an effort to provide guidance to lower courts, the Court stated that courts should determine reprehensibility

> by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. The Court further stated, "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." Id. With regard to the second guidepost, the Court stated, "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. at 425. In addition, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. The Court then qualified its previous statement by observing

that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." Id. Finally, when discussing the third guidepost, the Court held that

> [t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. Id. at 428.

Unlike the deferential standard of review employed when reviewing a jury's factual conclusions, we conduct a de novo review of the amount of a punitive damages award to determine whether the award meets due process requirements in light of the three guideposts. Id. at 418.

Having reviewed the applicable United States Supreme Court precedents, we now turn to the application of the principles set forth therein. The evidence in this case clearly demonstrates that DCC's conduct was reprehensible. Obviously, the harm suffered in this case was physical rather than economic. The death of a child is undoubtedly a

tragic experience that is far more serious than a mere economic loss. Furthermore, as we have summarized above, DCC's conduct evinces a conscious disregard for the safety of others. In addition, DCC deceitfully covered up evidence of the deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that put children's safety first. Finally, DCC's wrongdoing was not an isolated incident because DCC had knowledge of the danger its seats posed to the public for years and yet continued to sell its vehicles in an unreasonably dangerous condition throughout the State of Tennessee. We therefore conclude that under this first, most important guidepost DCC had fair notice that its conduct could subject it to a severe penalty.

We now turn to the second guidepost, the ratio between the punitive damages and compensatory damages. The trial court in this case remitted the punitive damages for the wrongful death of Joshua Flax to $13,367,345.[6] We must compare this punitive damage award to the $2,500,000 in compensatory damages for which DCC is liable for the wrongful death of Joshua Flax. The ratio between these two awards is 1 to 5.35. This ratio is not clearly impermissible because it does not exceed a single digit ratio. See Campbell, 538 U.S. at 425. There is, however, some doubt as to the propriety of a ratio of 1 to 5.35 because the United States Supreme Court has suggested that a ratio of more

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[6] Having invalidated the trial court's award of compensatory and punitive damages based on NIED, we need only discuss the punitive damages arising out of the wrongful death claim.

than 1 to 4 approaches the outer limits of constitutionality. Id.; Gore, 517 U.S. at 581. The Court has also suggested that a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are "substantial." See Campbell, 538 U.S. at 425. None of these ratios, however, present "rigid benchmarks," and the United States Supreme Court has thus far declined to adopt any fixed mathematical formula to determine the appropriateness of punitive damages. Id. Instead, the Court has held that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." Id.

In light of the first two guideposts, we believe that a ratio of 1 to 5.35 would be warranted in this case. Although the United State Supreme Court has made no effort to demonstrate when damages are "substantial," we do not believe that an award of $2,500,000 is so large as to require a ratio of 1 to 1. Furthermore, a punitive damage award of $13,367,345 is consistent with the concept that the reprehensibility of a defendant's conduct is the most important of the due process guideposts and is justified by DCC's long-term pattern of conduct that resulted in severe injuries to the plaintiffs and showed a conscious disregard for the safety of Tennessee citizens. Accordingly, in light of the first two guideposts we would hold that a punitive damage award approaching the maximum ratio permitted by the due process clause is appropriate.

The third guidepost set forth in Gore seems to compel a dramatically different conclusion. The statute that most closely expresses the Tennessee General Assembly's judgment concerning the

wrongfulness of DCC's conduct is the reckless homicide statute codified at Tennessee Code Annotated section 39-13-215 (2006). According to that statute, reckless homicide is "a reckless killing of another." Tenn. Code Ann. § 39-13-215. The meaning of the word "reckless" as it is used in that statute is identical to the meaning of "reckless" in a punitive damage context. Compare Hodges, 833 S.W.2d at 901, with Tenn. Code Ann. § 39-11-302(c) (2006). Because DCC's reckless conduct resulted in the death of Joshua Flax, reckless homicide is the criminal act most analogous to DCC's conduct.[7] The maximum statutory punishment for corporations that commit reckless homicide is a fine of $125,000. Tenn. Code Ann. § 40-35-111(c)(4) (2006).

Pursuant to the holding of the United States Supreme Court, we must accord "substantial deference" to the General Assembly's decision that $125,000 is an appropriate sanction against corporations guilty of reckless homicide. Gore, 517 U.S. at 583. Furthermore, we must "avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed." Campbell, 538 U.S. at 428. Although the United States Supreme Court has never held that the third guidepost is dispositive, it appears that under this guidepost $125,000 would be the maximum punitive damage

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[7] We express no opinion concerning whether DCC could actually be prosecuted for reckless homicide under Tennessee Code Annotated section 39-11-404 (2006). It is sufficient that the statutory definition of reckless homicide encompasses the conduct of DCC.

award that could be imposed in this case. Arguably, this is because DCC never had notice that it could be held liable for an amount greater than $125,000.[8] Clearly, the result recommended by the third guidepost is dramatically at odds with the result suggested by the first two. We are unfortunately left with little guidance as to how to resolve this discrepancy because both Gore and Campbell are cases in which all of the guideposts suggest the same result. Other courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether. See, e.g., In re Exxon Valdez, 490 F.3d 1066, 1094 (9th 2007) (noting that if the Court of Appeals for the Ninth Circuit mentions the third guidepost at all, it does not review the amounts of legislative penalties but determines "whether or not the misconduct was dealt with seriously under state civil or criminal laws"); Willow Inn, Inc. v Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 237-38 (3d Cir. 2005) (noting the difficulty courts have in applying the third guidepost and declining to overturn a punitive damage award on that basis alone).

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[8] We find this reasoning somewhat peculiar considering that our decision in Hodges clearly set forth both the conditions under which a defendant could be held liable for punitive damages and the factors that would determine the amount of punitive damages available. See Hodges, 833 S.W.2d at 901-02. Although those standards were necessarily imprecise, our decision in that case would appear to be sufficient to provide DCC with notice that consciously disregarding the safety of Tennessee citizens could subject it to a considerably large punitive damage award.

Although we are somewhat unsure how to reconcile the third guidepost with the first two, we are inclined to give the first two guideposts considerably more weight. The Unites States Supreme Court has held that the first guidepost is the most important and has never stated that the third guidepost is dispositive. Furthermore, we are unaware of any state or federal case that has invalidated a punitive damage award solely because the award was greater than that contemplated by statutory penalties. In addition, the trial court's award in this case is far less drastic than the awards rejected in Gore and Campbell, which were 1,000 and 14,500 times greater, respectively, than the maximum civil or criminal penalty. See Campbell, 538 U.S. at 428; Gore, 517 U.S. at 584. Finally, we do not believe that a punitive damage award of $125,000 would adequately punish DCC or deter future instances of similar conduct. For these reasons, we conclude that a punitive damage award of $13,367,345 is constitutionally permissible in this case.

c) Due Process Concerns and Harm to Non-Parties

DCC also contends that its right to due process was violated because the jury was allowed to punish DCC for harm suffered by persons who were not parties to the action. In support of this argument, DCC cites the United States Supreme Court's recent decision, Philip Morris. In Philip Morris, the Court held that trial courts must, upon request, provide assurance that juries are not allowed to punish defendants for harm caused to nonparties. Id. at

1065.[9] In the present case, DCC requested that the jury be instructed that it could not punish DCC for harm suffered by nonparties, but the trial court declined to give this instruction. Unfortunately, DCC did not question the rejection of its proposed jury instruction in the Court of Appeals. DCC now seeks to resurrect this issue before this Court. Litigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court. See Brown v. Crown Equip. Corp., 181 S.W.3d 268, 281 n.5 (Tenn. 2005); Va. & Sw. R.R. Co. v. Sutherland, 197 S.W. 863, 864 (Tenn. 1917). Accordingly, we do not reach the issue of whether the trial court erred by failing to instruct the jury not to punish DCC for harm suffered by nonparties.

IV. VALIDITY OF PLAINTIFFS' POST-SALE FAILURE TO WARN CLAIM

In their complaint, the plaintiffs asserted a claim based on DCC's failure to warn consumers that the Caravan's seatbacks posed a danger to children placed behind them. Prior to trial, the plaintiffs filed a trial brief clarifying that they were attempting to bring two separate failure to warn claims. The first

[9] The Court did attempt to clarify that injuries suffered by nonparties are relevant to demonstrate the reprehensibility of a defendant's conduct. Id. at 1064. As the Court stated, "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." Id. at 1065. Upon motion by the parties, trial courts are required to instruct the jury that it may consider harm to nonparties to determine reprehensibility but should not directly punish defendants for harm to nonparties.

claim is a traditional failure to warn claim alleging that DCC failed to provide a warning prior to or at the time the Caravan was sold. Tennessee courts have long held that a manufacturer may be held strictly liable for failing to warn consumers of the dangers of a particular product at the time of sale. Whitehead v. Dycho Co., 775 S.W.2d 593, 596 (Tenn. 1989); Trimble v. Irwin, 441 S.W.2d 818, 821 (Tenn. Ct. App. 1968). The General Assembly has also acknowledged that a failure to warn claim is a valid basis for a product liability action. Tenn. Code Ann. § 29-28-102(6) (2000). Accordingly, the trial court permitted the plaintiffs to proceed with the traditional failure to warn claim, and DCC has not appealed the trial court's ruling on that issue.

The plaintiffs' second failure to warn claim is more problematic. In their trial brief, the plaintiffs asserted that DCC should also be held liable for failing to warn the plaintiffs of the condition of the seatbacks after the Caravan was sold. Plaintiffs argued their second claim is what is commonly referred to as a "post-sale failure to warn" claim,[10] a claim that has not been previously recognized in Tennessee. Irion v. Sun Lighting, Inc., No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *17 (Tenn. Ct. App. Apr. 7, 2004). Under the assumption that their second claim was a post-sale failure to warn claim, the plaintiffs argued that the trial court

[10] For reasons that are explained below, we do not believe plaintiffs' second failure to warn claim is properly characterized as a post-sale failure to warn claim. Accordingly, we refer to their cause of action as the "second failure to warn claim" or the "second claim."

should join the jurisdictions that recognize the post-sale failure to warn claims and adopt the post-sale failure to warn provisions of the Restatement (Third) of Torts. See Restatement (Third) of Torts: Products Liability § 10 (1998). The trial court was persuaded by the plaintiffs' arguments and allowed the plaintiffs to present evidence and argument at trial in support of their second failure to warn claim. At the conclusion of the trial, the jury found the defendants liable on the plaintiffs' second failure to warn claim.

DCC contends that the trial court erred in recognizing the post-sale failure to warn claim. We agree. Although different states apply the doctrine differently, the vast majority of courts recognizing post-sale failure to warn claims agree that a claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product. See, e.g., Lovick v. Wil-Rich, 588 N.W.2d 688, 693 (Iowa 1999); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 645-46 (Md. 1992); Comstock v. Gen. Motors Corp., 99 N.W.2d 627, 634 (Mich. 1959); see also Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 18 (1999). Accordingly, courts apply the traditional failure to warn claim when a manufacturer or seller had knowledge of a defect at the time of sale and apply the post-sale failure to warn claim when a

manufacturer or seller learns of the defect after the time of sale.[11] Victor E. Schwartz, The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine, 58 N.Y.U. L. Rev. 892, 893 (1983).

Unlike plaintiffs in post-sale duty to warn cases, the plaintiffs in this case do not allege that DCC discovered problems with the seatbacks after the time of sale. On the contrary, the theory of the plaintiffs' case was that DCC had knowledge that the seats were defective and unreasonably dangerous as early as the 1980s. Furthermore, DCC does not deny that it had knowledge of the performance of its seats at the time of sale but argues that the seats functioned in a non-defective and reasonably safe manner. There is therefore no dispute regarding DCC's knowledge at the time of sale of the Caravan. Although the plaintiffs allege that DCC continued to receive notice that its product was dangerous after the sale, they do not allege that DCC received any new information during this period. Accordingly, this case does not present the facts necessary to allow us to consider the merits of recognizing post-

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[11] The distinction between the two causes of action is important because the burden of issuing a warning is much greater once the product has left the control of the manufacturer or seller. Restatement (Third) of Torts: Products Liability § 10 cmt. a. Therefore, jurisdictions that allow post-sale failure to warn claims generally consider the difficulty of identifying and communicating with product users when determining whether the manufacturer or seller acted reasonably. See id.; Lovick, 588 N.W.2d at 695-96. These difficulties are generally not an issue in traditional failure to warn claims.

sale failure to warn claims. Rather, the plaintiffs' allegation that DCC was negligent in failing to warn the plaintiffs after the sale is an attempt to impose liability a second time for what is essentially the same wrongful conduct. If a defendant negligently fails to warn at the time of sale, that defendant does not breach any new duty to the plaintiff by failing to provide a warning the day after the sale. Instead, the defendant merely remains in breach of its initial duty. For these reasons, we conclude that the trial court erred by adopting and applying the post-sale failure to warn claim in this case. We express no opinion, however, as to the merits of recognizing that cause of action in an appropriate case.

DCC claims the trial court's error was prejudicial to DCC in two ways. First, DCC claims that due process concerns are raised by allowing the jury to base its recklessness determination on a previously unrecognized cause of action. Essentially, DCC argues that it did not have notice that it could be punished for failing to issue a warning after the date of sale. See Gore, 517 U.S. at 574 (holding that a defendant is entitled to fair notice of "the conduct that will subject him to punishment"). Although the jury did find DCC liable for the post-sale duty to warn claim, it also found DCC liable on three other grounds—designing, manufacturing, and selling the Caravan with defective seats; designing, manufacturing, and selling the Caravan with unreasonably dangerous seats; and failing to warn the plaintiffs at the time of sale. There was sufficient evidence of recklessness related to these three claims from which a reasonable jury could have determined that punitive damages were warranted. Furthermore, in the second phase of the trial, the trial court instructed the jury that it was not to base

its award of punitive damages on the post-sale failure to warn claim. In spite of this instruction, the jury awarded $98,000,000 in punitive damages. The jury's belief that the three valid claims warranted such a substantial award is powerful evidence that the decision to impose punitive damages was not based upon the post-sale failure to warn claim. Furthermore, we are similarly unconvinced that the jury based the wrongful death award on the postsale failure to warn claim. Under the circumstances of this case, the three valid claims were sufficient to support a wrongful death award of $5,000,000. Accordingly, we find this argument to be without merit.

Second, DCC claims that the post-sale duty to warn claim permitted the admission of evidence that otherwise would have been deemed irrelevant. Specifically, DCC argues that the evidence of other similar incidents occurring after the date of sale would not have been admissible. Indeed, the plaintiffs acknowledged at trial and in their response to DCC's Motion for Judgment Notwithstanding the Verdict and New Trial that the other similar incidents were tendered and admitted only to prove that DCC had notice of the condition of the seats. The jury was also instructed that it could consider the other similar incidents only for the purpose of showing that DCC had notice of the seat's condition. In their post-trial motions and responses, the parties appeared to agree that the documents supporting the other similar incidents would have been inadmissible hearsay if offered to prove that the seats were defective or unreasonably dangerous. Clearly incidents that occurred after the date the plaintiffs purchased the Caravan could not have provided DCC with notice that it should provide a warning at the

time the Caravan was sold. It therefore appears that the trial court admitted evidence of the post-sale similar incidents to show notice with respect to the plaintiffs' second failure to warn claim. We agree that there would have been no valid reason to admit the post-sale similar incidents if the trial court had not recognized the plaintiffs' second failure to warn claim. Because we hold that the trial court should not have recognized this claim, the trial court erred in admitting evidence of the twenty-five other similar incidents that occurred after the Caravan was purchased in May 1998.

Our inquiry does not end here. DCC is entitled to reversal of the jury's verdict only if the trial court's error would have "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); accord Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 375 (Tenn. 2007). "The greater the amount of evidence of guilt, the heavier the burden on the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial." State v. Rodriguez, ___ S.W.3d ___, ___ (Tenn. 2008).

Although the jury heard evidence of twenty-five post-sale similar incidents, the trial court instructed the jury that it could consider that evidence only for the purpose of determining whether DCC had notice of the condition of the seats. We presume that the jury followed the trial court's instruction and did not consider the other similar incidents for purposes of determining whether the seats were unreasonably dangerous. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). We therefore conclude that the trial court's instruction significantly reduced the danger

of prejudice to DCC. In addition, the trial judge's remittitur of the punitive damages award also limited the danger that the evidentiary error affected the judgment in this case.

Most importantly, there was a wealth of evidence supporting the jury's verdict. There was testimony that DCC had received notice of children injured by yielding seatbacks as early as the mid-1980s. DCC's own crash test videos demonstrated that seatbacks consistently yielded into the passenger space behind them in rear-end collisions. Mr. Sheridan testified that the MSLT informed DCC executives that the seats were dangerous. Finally, the plaintiffs introduced twelve similar incidents that occurred before the date of sale. Of those twelve, three incidents involved a child suffering skull or facial fractures as a result of a yielding seat. Three others involved children suffering other injuries from yielding seatbacks. The jury's verdict is amply supported by this properly admitted evidence. In light of the wealth of evidence supporting the jury's verdict, we conclude that the twenty-five other similar incidents that were improperly admitted were not so significant as to affect the jury's verdict. Accordingly, we conclude that the trial court's decision to admit the post-sale other similar incidents did not prejudice the judicial process or more probably than not affect the judgment.

We are not indifferent to Justice Koch's concerns about the volume of improperly admitted evidence and the potential for prejudice when admitting other similar incidents. As we have stated, however, the proof of DCC's recklessness is so powerful that the jury was probably not affected by the trial court's error. Justice Koch has a very different view of the

evidence in this case, and it is therefore unsurprising that his dissent expresses a greater estimation of the impact of the trial court's error.

V. MISCELLANEOUS RULINGS OF THE TRIAL COURT

DCC also argues that it was prejudiced by various other rulings of the trial court. Specifically, DCC argues that the trial court abused its discretion by admitting the other similar incidents that occurred prior to the sale of the Caravan, excluding accident data proffered by DCC, and failing to grant a new trial as a sanction for the trial court's determination that plaintiffs abused the discovery process. DCC also argues that the absence of a valid ad damnum clause in plaintiffs' complaint should bar any award to the plaintiffs. For the reasons stated by the Court of Appeals, we conclude that each of these arguments is without merit.

VI. CONCLUSION

We hold that Ms. Sparkman's NIED claim is a "stand-alone" claim in spite of the fact that she simultaneously brought a wrongful death claim. Therefore, Ms. Sparkman's NIED claim should have been supported by expert medical or scientific proof of a severe emotional injury. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim. In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Therefore, we reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim. Finally, we hold that the trial court erred by recognizing the plaintiffs' second

failure to warn claim but conclude that the error did not more probably than not affect the judgment or prejudice the judicial process. Costs of this appeal are taxed equally to the appellee, DaimlerChrysler Corporation, and the appellants, Jeremy Flax and Rachel Sparkman, and their sureties for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

In the

Supreme Court

of Tennessee

At Nashville

No. M2005-01768-SC-R11-CV

JEREMY FLAX et al. v. DAIMLERCHRYSLER CORPORATION et al.

Appeal by Permission from the Court of Appeals, Middle Section Circuit Court for Davidson County No. 02C-1288 Hamilton V. Gayden, Jr. Judge

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October 25, 2007 Session Heard at Maryville[1]

Filed July 24, 2008

WILLIAM C. KOCH, JR., J., concurring in part and dissenting in part.

The Court has decided to uphold a judgment for $18,367,345 in compensatory and punitive damages arising out of the death of an eight-month-old child in a collision between a minivan and a truck. While

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[1] Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

the parents' loss of their child is heart-wrenching and tragic, I cannot concur in affirming the awards of either compensatory or punitive damages against the manufacturer of the minivan in which the child was a passenger. The child's parents are not entitled to $13,367,345 in punitive damages because they have failed to present clear and convincing evidence that the manufacturer acted recklessly in the design, construction, or marketing of the minivan. They are likewise not entitled to recover $5,000,000 in compensatory damages because of the erroneous admission of evidence regarding twenty-five "similar incidents" occurring after the date that the minivan was sold. Accordingly, rather than approving the award of $18,367,345 in compensatory and punitive damages, I would remand the case for a new trial on the issue of compensatory damages only.

I.

In June 2001, Jim and Sandra Sparkman resided in Kingston Springs, Tennessee with their adult daughter, Rachel Sparkman, and Joshua Flax, Rachel Sparkman's eight-month-old son. The Sparkmans owned a 1998 Dodge Caravan minivan manufactured by DaimlerChrysler Corporation ("DaimlerChrysler"). On the morning of June 30, 2001, shortly after Mr. Sparkman turned left onto Old Charlotte Pike from a private driveway, a truck being driven by Louis A. Stockell, Jr. crashed into the rear of the Sparkmans' minivan. Mr. Stockell's truck was traveling between fifty and fifty-five miles per hour despite a thirty-five mile per hour speed limit. The force of the collision propelled the minivan off the roadway, up a small hill, and head-

on into a tree.[2] The minivan's rear bumper sustained almost two feet of crash damage, and the force of the collision jammed the doors shut.

When the collision occurred, Mr. Sparkman was in the driver's seat, and another adult passenger was in the front passenger's seat. Rachel Sparkman was seated in a captain's chair style seat immediately behind her father, and Joshua Flax was strapped in a forward-facing baby seat in the captain's chair style seat immediately behind the front passenger seat. Two other adults were seated in a third row of seats. None of the adults in the minivan were seriously injured. However, Joshua Flax sustained severe head injuries when the collision caused the back of the seat in front of him to yield backward and to strike him on the head. Joshua Flax died at the hospital the following day.

On May 7, 2002, Rachel Sparkman and Jeremy Flax,[3] along with the Sparkmans filed a complaint in the Circuit Court for Davidson County against DaimlerChrysler and Mr. Stockell. Of particular relevance to this appeal, Rachel Sparkman and Jeremy Flax sought to recover compensatory and punitive damages for the wrongful death of Joshua Flax.[4] For her own part, Rachel Sparkman also

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[2] Mr. Stockell's truck also veered off the road and followed the minivan up the hill. After the minivan struck the tree, Mr. Stockell's truck collided with the rear of the minivan a second time.

[3] Jeremy Flax is Joshua Flax's biological father.

[4] The wrongful death claims included allegations that DaimlerChrysler was negligent in the design, manufacture, and sale of the minivan and that the front seats in the minivan were

[Footnote continued on next page]

sought compensatory and punitive damages for negligent infliction of emotional distress.

The trial before a Davidson County jury began on November 3, 2004. On November 22, 2004, the jury returned a verdict finding that both DaimlerChrysler and Mr. Stockell were fifty percent at fault for Joshua Flax's death and for Ms. Sparkman's emotional injuries. The jury returned a $5,000,000 verdict on the wrongful death claim and a $2,500,000 verdict on Ms. Sparkman's negligent infliction of emotional distress claim. The jury also decided that DaimlerChrysler had acted recklessly and, therefore, that DaimlerChrysler could be required to pay punitive damages. The jury retired to deliberate further and, on November 23, 2004, returned a verdict against DaimlerChrysler awarding $66,500,000 in punitive damages on the wrongful death claim and $32,500,000 in punitive damages on Ms. Sparkman's negligent infliction of emotional distress claim.

DaimlerChrysler filed the usual post-trial motions challenging both the awards of compensatory damages and the awards of punitive damages. On July 11, 2005, the trial court filed a final order and judgment affirming the compensatory

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defective and unreasonably dangerous. Rachel Sparkman and Jeremy Flax also alleged that DaimlerChrysler had violated its post-sale duty to warn owners about the defective and dangerous seats in the minivan. They also alleged that DaimlerChrysler knew that the seats were dangerous but had recklessly failed either to correct them or to warn the minivan owners of the danger.

damages awards. Exercising its authority under Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992), the trial court reduced the punitive damages award on the wrongful death claim from $66,500,000 to $13,367,345 and the punitive damages award on Ms. Sparkman's negligent infliction of emotional distress claim from $32,500,000 to $6,632,655.

DaimlerChrysler, as well as Ms. Sparkman and Mr. Flax, appealed to the Court of Appeals. Following oral arguments in July 2006, the appellate court filed a lengthy and detailed opinion on December 27, 2006. Flax v. DaimlerChrysler Corp., No. M2005-01768-COA-R3-CV, 2006 WL 3813655 (Tenn. Ct. App. Dec. 27, 2006). The Court of Appeals affirmed the $5,000,000 award of compensatory damages for the wrongful death of Joshua Flax. However, the court reversed the compensatory and punitive damage awards for Ms. Sparkman's negligent infliction of emotional distress claim because Ms. Sparkman had failed to present expert evidence that she had sustained serious and severe emotional injuries. The appellate court also reversed the $13,367,345 award for punitive damages for the wrongful death of Joshua Flax after concluding that Rachel Sparkman and Jeremy Flax had failed to present clear and convincing evidence that DaimlerChrysler had acted recklessly.

We granted Rachel Sparkman's and Jeremy Flax's application for permission to appeal to review the Court of Appeals' decision to dismiss Ms. Sparkman's claim for negligent infliction of emotional distress and to reverse the $13,367,345 award for punitive damages for the wrongful death of Joshua Flax. In accordance with Tenn. R. App. P.

13(a), DaimlerChrysler has also asserted that it is entitled to a new trial on the wrongful death claim.

The Court has now determined that the Court of Appeals properly reversed the awards for compensatory and punitive damages for Ms. Sparkman's negligent infliction of emotional distress claim. The Court has also affirmed the $5,000,000 award of compensatory damages and has reinstated the $13,367,345 award of punitive damages for the wrongful death of Joshua Flax. While I concur fully with the reasoning and the result of the Court's disposition of the negligent infliction of emotional distress and post-sale failure to warn claims, I cannot concur with the decision to affirm the awards of compensatory and punitive damages on the wrongful death claims.

II.

THE PUNITIVE DAMAGES AWARD

Punitive damages have been awarded by Tennessee's courts for almost one hundred and seventy years.[5] Their two-fold purpose is to punish wrongful conduct and to deter others from engaging in similar conduct in the future. Miller v. United Automax, 166 S.W.3d 692, 697 (Tenn. 2005);

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[5] Wilkins v. Gilmore, 21 Tenn. (2 Hum.) 140, 141 (1840). By 1870, punitive damages awards were so well-established, that this Court, despite its strong misgivings, declined to discontinue them. Dougherty v. Shown, 48 Tenn. (1 Heisk.) 302, 305-06 (1870). During this time, punitive damages have been referred to as "exemplary damages," "vindictive damages," and "smart money." Liberty Mut. Ins. Co. v. Stevenson, 212 Tenn. 178, 180, 368 S.W.2d 760, 761 (1963).

Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 906-07 (Tenn. 1999). As salutary as these purposes are, the courts have recognized that awards of punitive damages pose an acute danger of arbitrary deprivation of property, Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994), and that they have a devastating potential for harm when imposed indiscriminately, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting)).

Sixteen years ago, this Court, acknowledging the potential difficulties with punitive damages awards, limited the circumstances in which punitive damages could be awarded and prescribed procedures to assure that punitive damages were not arbitrarily and capriciously awarded. Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992). We recognized that punitive damages could be a deterrent against "truly reprehensible conduct," Hodges v. S.C. Toof & Co., 833 S.W.2d at 901, and thus we limited punitive damages awards to circumstances in which the defendant has acted intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

At the same time that we circumscribed the circumstances in which punitive damages could be awarded, we prescribed four procedures designed to assure that punitive damages, when warranted, were imposed in only the "most egregious cases" and then, in a manner consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Constitution of Tennessee. See Hodges v. S.C. Toof & Co., 833 S.W.2d at 900-02. These procedures

include: (1) a bifurcated trial,[6] (2) a heightened burden of proof,[7] (3) specific instructions,[8] and (4) independent judicial oversight over punitive damages awards.[9] This case requires consideration of the plaintiff's heightened burden of proof and the courts' oversight of punitive damages awards.

We decided in Hodges v. S.C. Toof & Company that plaintiffs seeking punitive damages must present "clear and convincing evidence" that the defendant's acts that caused their injury were intentional, fraudulent, malicious, or reckless. Hodges v. S.C. Toof & Co., 833 S.W.2d at 901 & n.3. The clear and convincing evidence standard requires that the truth of the proposition sought to be established by the evidence be highly probable. Teter v. Republic Parking Sys., Inc., 181 S.W.3d 330, 341 (Tenn. 2005). Clear and convincing evidence leaves no serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002); Hodges v. S.C. Toof & Co., 833 S.W.2d at 901 n.3. Thus, clear and convincing evidence produces in the fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. In re Tiffany B., 228 S.W.3d 148, 155-56 (Tenn. Ct. App. 2007); Hibdon v. Grabowski, 195 S.W.3d 48, 63 (Tenn. Ct. App. 2005); Wiltcher v. Bradley, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

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[6] Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

[7] Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

[8] Hodges v. S.C. Toof & Co., 833 S.W.2d at 901-02.

[9] Hodges v. S.C. Toof & Co., 833 S.W.2d at 902.

Giving juries discretion to award punitive damages creates the potential that juries will use their verdicts to express biases against big businesses, especially ones without a strong local presence. Honda Motor Co. v. Oberg, 512 U.S. at 432. Accordingly, in Hodges v. S.C. Toof & Company, we required the trial courts to review punitive damages awards differently than the way they customarily review jury verdicts and compensatory damages awards. Rather than performing their traditional task as the thirteenth juror, we directed trial courts to "review the award, giving consideration to all matters on which the jury is required to be instructed." Hodges v. S.C. Toof & Co., 833 S.W.2d at 902. We also directed trial courts to "clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed." Hodges v. S.C. Toof & Co., 833 S.W.2d at 902.

Because punitive damages awards are different, they also require a different standard of appellate review. This standard of review consists of two steps.

A heightened burden of proof requires a heightened standard of appellate review.[10] Accordingly, the first step in reviewing a punitive damages award on appeal is to review the record to determine whether it contains material evidence that supports a finding by clear and convincing evidence that the defendant acted intentionally, fraudulently,

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[10] Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004).

maliciously, or recklessly.[11] See, e.g., Buell-Wilson v. Ford Motor Co., 73 Cal. Rptr. 3d 277, 312 (Ct. App. 2008); Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996); York v. InTrust Bank, N.A., 962 P.2d 405, 429 (Kan. 1998); Flippo v. CSC Assocs. III, L.L.C., 547 S.E.2d 216, 223 (Va. 2001). At this stage, the appellate court must determine whether the jury could reasonably have been persuaded that the required factual findings were proved to be highly probable. Shrader-Miller v. Miller, 855 A.2d 1139, 1145 (Me. 2004). Stated another way, the appellate court must ask whether sufficient material evidence was presented to produce in the mind of a reasonable fact-finder a firm belief or conviction as to the matters required to be proven. Telecheck Servs., Inc. v. Elkins, 226 S.W.3d 731, 735 (Tex. Ct. App. 2007). Any lesser standard of review dilutes the sixteen-year-old requirement that plaintiffs seeking punitive damages must prove by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly.[12]

If the appellate court determines that the plaintiff has proved by clear and convincing evidence that it is entitled to punitive damages, the second step of the appellate review process requires the appellate court to engage in an exacting appellate review to ensure that the punitive damages award is

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[11] Cf. Shell v. Law, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996) (stating that "when we reach issues requiring the evidence to be clear, cogent and convincing, [we will] examine the record to determine if there is sufficient proof to constitute clear, cogent and convincing evidence to support the findings of the jury.").

[12] Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

based on an application of the law rather than the decision-maker's caprice. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 418. Rather than being deferential to the trial court, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001), this review must be "independent." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 435.

At this stage of the review, the appellate court must engage in an independent, de novo evaluation of the three "guideposts" for punitive damages first required in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996). State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 418; Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 436. These guideposts include (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. BMW of N. Am., Inc. v. Gore, 517 U.S. at 575.

An award of punitive damages is an expression of moral condemnation. Copper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 432. The purpose of this exacting appellate review is to assure that the defendant's conduct is the "most egregious of wrongs," Cf. Cambio Health Solutions, LLC v. Reardon, 213 S.W.3d 785, 792 (Tenn. 2006), and that it is so reprehensible that it must be both punished and deterred. Cf. Culbreath v. First Tenn. Bank Nat'l Ass'n, 44 S.W.3d 518, 528-29 (Tenn. 2001); Metcalfe v. Waters, 970 S.W.2d 448, 450 (Tenn. 1998). Using these principles, respectfully, it is my

view that this case is neither close nor difficult. Ms. Sparkman and Mr. Flax have failed to prove by clear and convincing evidence that DaimlerChrysler acted so recklessly with regard to the design, construction, and marketing of the 1998 Dodge Caravan that it should be punished by an award of punitive damages.

At the time the 1998 Dodge Caravan was designed and manufactured, there was a genuine principled debate in the automotive community regarding just how rigid or stiff car seatbacks should be. Some, like the plaintiffs' witness, Kenneth Saczalski , favored using seats that were more rigid than the seats that were generally being used in American vehicles. Others, like DaimlerChrysler, were wary of using more rigid seats because of their concern that making the front seats more rigid would expose the occupants of a vehicle to other, equally serious injuries. Accordingly, balancing the risks presented by impact occurring from various directions, DaimlerChrysler designed the front seats of the minivan to yield in a controlled manner in the event of a rear impact.

The evidence showed that the design of car seats is a complex engineering issue that requires reasonable safety trade-offs. In fact, the National Highway Traffic Safety Administration issued a report while this trial was in progress that stated: "Improving seating system performance is more complex than simply increasing the strength of the seatback. A proper balance in the seatback strength and compatible interaction with head restraints and seat belts must be obtained to optimize injury mitigation." Neither the industry nor the

government regulators have sided with Dr. Saczalski's proposals.

All the witnesses, including those testifying for DaimlerChrysler, stated that the FMVSS 207[13] standard that had been in place for thirty years was inadequate. Accordingly, when DaimlerChrysler designed and built the 1998 Dodge Caravan, it set goals for seat strength that doubled the standards in FMVSS 207. The seat that DaimlerChrysler actually designed and installed in the 1998 Dodge Caravan exceeded even DaimlerChrysler's internal standards. It was essentially undisputed that the front seats in this minivan were "mainstream" seats, that is, that they were very similar to almost every other front outboard seat in similar vehicles.

There is no question that persons have been injured riding in the Dodge Caravan. The trial court determined that out of the 7,000,000 minivans that had been sold, there were thirty-seven similar incidents. However, all of the witnesses testified that automobiles should be designed in a way that enables them to be as safe as possible in light of the innumerable ways in which accidents can occur. While DaimlerChrysler may not have satisfied Dr. Saczalski, its seats were triple the strength required by FMVSS 207, and they exceeded the

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[13] 49 C.F.R. § 571.207 (2007). The purpose of this standard is to establish "requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact." 49 C.F.R. § 571.207, S1.

strength of many other automobile seats.[14] On these objective facts,[15] I find it difficult to conclude that the

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[14] A manufacturer's compliance with applicable governmental safety regulations and industry standards does not, by itself, prevent awards of punitive damages. However, evidence of a manufacturer's compliance with governmental and industry standards is evidence that the manufacturer did not recklessly disregard safety. See, e.g., David G. Owen et al., Madden & Owen on Products Liability § 18.6, at 305 (3d ed. 2000); Victor E. Schwartz et al., Guide to Multistate Litigation § 10.07, at 202 (1985); David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 40-42 (1982) [hereinafter "Owen, Problems"]. Many government safety standards, including the numerous standards issued by the National Highway Transportation Safety Administration, have been adopted within a "gray area where the difficulties of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great." Owen, Problems, 49 U. Chi. L. Rev. at 41-42 & n.196. The difficulty for manufacturers is heightened even further when an industry is making safety decisions upon which experts and government regulators have been unable to reach any consensus. Accordingly, decisions made within these gray areas should not generally warrant a punitive damages award. See Owen, Problems, 49 U. Chi. L. Rev. at 40-42 & n.196.

[15] The plaintiffs' evidence regarding DaimlerChrysler's recklessness includes the testimony of a former employee, Paul Sheridan, who chaired DaimlerChrysler's Minivan Safety Leadership Team. This committee was apparently created in late 1992, partially in response to an investigative story regarding the safety of car seats that had been aired on *Sixty Minutes* in February 1992. Its purpose was to advise upper level management about what needed to be done in the area of safety. Mr. Sheridan, who has been excluded from testifying regarding seatback design in other cases, Gardner ex rel. Gardner v. Chrysler Corp., 89 F.3d 729, 737-38 (10th Cir. 1996), testified that he showed the *Sixty Minutes* story at a team meeting in March 1993 and that the team discussed seatback

[Footnote continued on next page]

plaintiffs presented clear and convincing evidence that DaimlerChrysler acted so recklessly that the company should be punished beyond being required to pay compensatory damages.

III.
THE EVIDENCE OF THE TWENTY-FIVE POST-SALE INCIDENTS

As part of the proof to support their post-sale duty to warn claim, Ms. Sparkman and Mr. Flax presented evidence regarding twenty-five incidents that occurred after the sale of the Sparkmans' minivan and that allegedly were similar to the accident that occurred on June 30, 2001. The Court has properly determined that the evidence of these incidents should not have been introduced because Ms. Sparkman and Mr. Flax cannot assert a post-

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strength. He also testified that he was ordered to collect and destroy the minutes of the March 1993 meeting and that the team was disbanded in November 1994. Chrysler discharged Mr. Sheridan in December 1994 after accusing him of leaking confidential developmental testing information to *Auto World* magazine. Mr. Sheridan denied the accusation. See Chrysler Corp. v. Sheridan, No. 227757, 2003 WL 327714 (Mich. Ct. App. Feb. 11, 2003), *perm. app. denied*, 666 N.W.2d 668 (Mich. 2003) (Table). Mr. Sheridan's testimony may very well reflect DaimlerChrysler's overreaction to the *Sixty Minutes* story and the existence of some internal dissension regarding how best to respond to the concerns about car seat safety raised by the story. However, taken in the context of all the evidence in this case, it does not demonstrate clearly and convincingly that DaimlerChrysler's engineers were acting recklessly when they designed a front seat for the 1998 Dodge Caravan that was intended to yield in a controlled way when the minivan was struck from behind.

sale failure to warn because they claimed that DaimlerChrysler was aware of the alleged dangerousness of the minivan's front seats before the time of the sale.[16] However, the Court has also determined that the introduction of the evidence of these twenty-five post-sale incidents was harmless error. I respectfully cannot agree.

When appellate courts conduct a harmless error analysis under Tenn. R. App. P. 36(b), they must avoid acting like a second jury by basing their analysis on their own assessment of the defendant's guilt. State v. Rodriguez, 254 S.W.3d 361, ___, 2008 WL 1817361, at *10 (Tenn. 2008). Rather, harmless error scrutiny focuses on the actual basis for the jury's verdict, State v. Mallard, 40 S.W.3d 473, 489 (Tenn. 2001), and the impact that the erroneously admitted evidence had on the jury's decision-making. See State v. Denton, 149 S.W.3d 1, 16-17 (Tenn. 2004). A harmless error analysis requires a careful examination of the entire record to determine whether the erroneously admitted evidence more probably than not affected the judgment or resulted in prejudice to the judicial process. State v. Rodriguez, 254 S.W.3d at ___, 2008 WL 1817361, at *10.

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[16] The Court has not directly addressed DaimlerChrysler's argument that many of these incidents were not substantially similar to the collision that gave rise to this lawsuit. Based on my review of the record, it appears that DaimlerChrysler is correct, and thus there is a second, equally valid, basis for concluding that the admission of the evidence involving many of these incidents was error.

We visited the outer boundaries of the harmless error doctrine in 2004 when the Court, by a divided vote, upheld a $7,366,000 verdict in a medical malpractice case by deciding that a trial judge's critical comment regarding a key witness's credibility in the presence of the jury was harmless error. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 134 (Tenn. 2004).[17] The Court is returning to the outer boundary between harmful and harmless error in order to uphold this $18,367,345 verdict. I cannot follow along.

Any objective reader of this voluminous record cannot help being struck by the frequency of the references in the plaintiffs' case to the other allegedly similar incidents in which persons riding in Chrysler minivans were injured when the seats yielded in rear end collisions. The plaintiffs' lawyers repeatedly argued to the jury that "[y]ou're going to hear about a bunch of them . . . There is no way to know for sure how many times Chrysler or DaimlerChrysler seatbacks have collapsed in wrecks" or that "the weak seatbacks . . . have killed and injured a lot of people" or that "[t]here is no evidence from DaimlerChrysler Corporation that those 37 are the only ones killed and injured."

Courts are generally cautious in the admission of similar incident evidence precisely because of the prejudice that it can carry.[18] Such evidence has been

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[17] The trial court stated in the jury's presence that the witness had changed her testimony. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d at 144 (Drowota, C.J., dissenting).

[18] 1 McCormick on Evidence § 2000m, at 800 (Kenneth S. Broun ed., 6th ed. 2006).

described as "extremely harmful to the defense"[19] and "highly prejudicial,"[20] and it has been noted that the presentation of repetitive accident evidence can prejudice the jury.[21] The references to other similar incidents in this case are so numerous that a reasonable person cannot be sure what evidence eventually tipped the jury in favor of holding DaimlerChrysler liable for the wrongful death of Joshua Flax or in calculating the compensatory and punitive damages or both. It is highly unlikely that the jury was not influenced in some way by the sheer volume of these allegedly similar incidents. Under these circumstances, the jury's assessment of DaimlerChrysler's liability and the amount of damages was, more probably than not, affected by the evidence of other similar incidents that should not have been admitted.

IV.

I do not relish the prospect of requiring these parties to try this case again. However, when reversible error infects the fact-finding process, a new trial is the only suitable remedy. For the reasons stated herein, I would reverse the judgment and remand the case for a new trial on the issue of compensatory damages only.

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[19] John Deere Co. v. May, 773 S.W.2d 369, 374 (Tex. Ct. App. 1989).

[20] Whaley v. CSX Transp., Inc., 609 S.E.2d 286, 300 (S.C. 2005).

[21] David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive-Damage Award?*, 57 Md. L. Rev. 174, 229 (1998).

WILLIAM C. KOCH, JR., JUSTICE

In the
Supreme Court
of Tennessee
At Nashville

No. M2005-01768-SC-R11-CV

JEREMY FLAX et al. v. DAIMLERCHRYSLER CORPORATION et al.

Appeal by Permission from the Court of Appeals, Middle Section Circuit Court for Davidson County No. 02C-1288 Hamilton V. Gayden, Jr. Judge

October 25, 2007 Session Heard at Maryville[1]

Filed July 24, 2008

Cornelia A. Clark, J., concurring in part and dissenting in part.

The heart-wrenching facts of this wrongful death/emotional distress case, which are adequately set forth in the majority opinion, need not be restated here. The tragedy visited upon this family

[1] Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

is indeed great. The record, like the trial itself, is lengthy. The trial testimony is extensive and, at times, contradictory. The fact that the members of this Court disagree as to how to resolve some of the difficult legal issues–which are hotly contested–is no surprise. The case is complex on multiple levels and resolving the issues presented while attempting to achieve a just result has proven to be no easy task.

I.

In light of the settled principles discussed in Part II of the majority opinion, I fully concur in this part of the opinion, which affirms the Court of Appeals' reversal of the compensatory and punitive damage awards to Ms. Sparkman based on her negligent infliction of emotional distress claim. Like the majority, I believe that such claims must be supported by expert medical or scientific evidence as required by Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996). The present case is no exception, notwithstanding the difficult circumstances experienced by Ms. Sparkman immediately following the accident. Although I agree with the plaintiffs that some circumstances obviously result in severe emotional distress, creating an exception to the heightened proof requirements of Camper would, in my view, undermine Camper's goal of bringing a measure of consistency and predictability to an area of the law that had become unwieldy precisely because of exceptions. See Camper, 915 S.W.2d at 445 (noting that ad hoc exceptions in emotional distress cases had "robbed the law of logic, consistency and fairness"). In my view, requiring all plaintiffs to meet the heightened proof requirements of Camper provides a much needed common thread in cases for negligent infliction of emotional distress.

Accordingly, the compensatory and punitive awards to Ms. Sparkman for her emotional distress cannot stand.

I further concur in that portion of Part IV of the majority opinion holding that the trial court erred in recognizing the plaintiffs' second failure to warn claim. The plaintiffs do not contend that the manufacturer of their minivan discovered problems with the seats after they purchased the vehicle. Thus, the case simply does not present facts necessary for us to consider the viability of a true post-sale failure to warn cause of action. For us to resolve that issue in the context of this case would be tantamount to giving an advisory opinion. See State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000) (noting that courts are not to render advisory opinions). In order to have a justifiable controversy, a real question rather than a theoretical or hypothetical one must be at stake. Id. If the rule were otherwise, the "courts might well be projected into the limitless field of advisory opinions." Story v. Walker, 404 S.W.2d 803, 804 (Tenn. 1966) (internal citation omitted). It follows that deciding whether Tennessee common law should recognize a post-sale failure to warn claim must await another day.

I also concur in Part V of the majority opinion, which adopts the reasoning of the Court of Appeals in upholding miscellaneous evidentiary and other rulings of the trial court. These rulings concern the admission of similar incidents that occurred prior to the sale of the minivan, excluding accident data proffered by the manufacturer, the failure to grant a new trial as a sanction for purported discovery abuse by the plaintiffs, and not imposing a sanction for an

invalid ad damnum clause in the complaint. Like the majority, I conclude that these largely collateral issues have no merit.

II.

Where I part ways with the majority is in its analysis of the punitive damages issue in Part III of the opinion. The jury awarded $5,000,000 in compensatory damages to the parents of Joshua for the child's wrongful death. The remitted amount of punitive damages awarded was $13,367,345 for the child's death. The majority affirms these awards, finding specifically that the punitive award is supported by clear and convincing evidence of recklessness and that the admission of twenty-five purportedly similar accidents after the minivan was sold is harmless error.

Concerning evidence of the post-sale accidents, I agree with all of my colleagues that the introduction of proof about those incidents was error. In my view, Justice Koch, in his separate opinion, properly emphasizes the frequency of references in plaintiffs' case to other allegedly similar incidents, and I specifically agree with him that, as to the finding of recklessness required in order to award punitive damages, the admission of the error did more probably than not affect the jury's decision to award punitive damages. Thus, the error cannot be deemed harmless under Tenn. R. App. P. 36(b). I concur in Justice Koch's analysis. Therefore, I would reverse the judgment of punitive damages and remand the case for a new trial on that issue.

While the introduction of the twenty-five post-sale accidents casts serious doubt on the legitimacy of the punitive award, it does not, in my view, destroy the jury's decision to find liability and award

compensatory damages. The jury found the manufacturer liable on three grounds other than its breach of a post-sale duty to warn: (1) designing, manufacturing, and selling the minivan with defective seats,[2] (2) designing, manufacturing, and selling the minivan with unreasonably dangerous seats,[3] and (3) failing to warn at the time the vehicle was sold. I agree with the majority that, viewing the record as a whole, there is adequate evidence to support the jury's decision to impose liability and award compensatory damages, despite the introduction of the post-sale accidents. See State v. Mallard, 40 S.W.3d 473, 489 (Tenn. 2001) ("[W]hen looking to the effect of an error on the trial, we will evaluate that error in light of all of the other proof introduced at trial.").

Because compensatory and punitive damage awards serve vastly different purposes,[4] I have no

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[2] A defective product is one that has a condition rendering the product "unsafe for normal or anticipatable handling and consumption." Tenn. Code Ann. § 29-28-102(2) (2000).

[3] An unreasonably dangerous product is one that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition." Tenn. Code Ann. § 29-28-102(8) (2000).

[4] Compensatory damages are designed to make the plaintiff whole. Hodges, 833 S.W.2d at 902. In contrast, the purpose of punitive damages is to punish the wrongdoer and deter the wrongdoer and others from engaging in similar misconduct in the future. Id. at 900. Thus, unlike compensatory damages, an

[Footnote continued on next page]

difficulty affirming the compensatory award for the child's wrongful death. Although the improperly admitted evidence of post-sale incidents likely infected the jury's decision to deter and punish the manufacturer as an expression of moral condemnation, I do not believe the same can be said of the jury's decision to make the plaintiffs whole. That is, unlike with a punitive award, the reprehensibility of the manufacturer's actions in light of post-sale accidents was a nonfactor in evaluating whether to impose liability and calculate a compensatory award. Indeed, the entire concept of recklessness on the part of the manufacturer was irrelevant on those issues. Therefore, it is much less likely that the improperly admitted evidence tainted the jury's decision on issues having nothing to do with punitive damages. Accordingly, I would affirm the compensatory award for the child's wrongful death.

In summary, I concur with the majority on all issues except their affirmance of the punitive damages award. I would remand for a retrial only on the issue of punitive damages.

CORNELIA A. CLARK, JUSTICE

[Footnote continued from previous page]
award of punitive damages is not designed to compensate the injured party. Id.

In the

Supreme Court

of Tennessee

At Nashville

No. M2005-01768-SC-R11-CV

JEREMY FLAX et al. v. DAIMLERCHRYSLER CORPORATION et al.

Appeal by Permission from the Court of Appeals, Middle Section Circuit Court for Davidson County No. 02C-1288 Hamilton V. Gayden, Jr. Judge

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October 25, 2007 Session Heard at Maryville[1]

Filed July 24, 2008

GARY R. WADE, J., concurring.

I concur with Justice Holder and Chief Justice Barker as to the propriety of the award of $5 million for the wrongful death of Jeremy Flax, apportioned one-half to the fault of the DaimlerChrysler Corporation [the "Defendant"] and the other one-half

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[1] Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

to Lewis Stockell. I further concur in their affirmance of the trial court's reduction of punitive damages against the Defendant regarding the wrongful death action from $65,500,000 to $13,367,345. Finally, I agree that the $2.5 million in compensatory damages awarded Rachel Sparkman for the negligent infliction of emotional distress, one-half of which was adjudged against the Defendant, and the punitive damages of $6,632,655, all of which was assessed against the Defendant, should be set aside.

Because of the lengthy trial in Davidson County and a transcript consisting of thousands of pages of pleadings, testimony, and exhibits, I commend the author, as well as the other members of this Court for the time and effort expended on record review and the resolution of these most difficult issues. I part with my colleagues who join in the lead opinion only as to the viability of a cause of action based upon the post-sale duty to warn. By way of explanation, I would acknowledge the Restatement (Third) of Torts: Products Liability § 10 (1998) as authority, as did the trial court. I believe, therefore, that the trial court (which, of course, could not have known prior to the verdict that the jury would ultimately sustain the pre-sale duty to warn claim) properly admitted testimony about similar accidents taking place after the sale of the 1998 Dodge Grand Caravan for the limited purpose of establishing that the Defendant had notice of the defective seat design, which contributed to the death of Joshua Flax. For that reason, I see no need for a harmless error analysis.

The complaint included allegations that the Caravan, manufactured by the Defendant and

operated by Jim Sparkman at the time of the accident, included front seats that were defective and unreasonably dangerous, and which posed a danger to any children seated directly to the rear.[2] Because the Defendant had failed to issue any warnings to consumers of that danger, there were allegations that the company was responsible for compensable damages under the Tennessee Products Liability Act of 1978. Tenn. Code Ann. §§ 29-28-101 to -108 (2000). Moreover, Jeremy Flax, Joshua's father, and Rachel Sparkman, his mother [the "Plaintiffs"], maintained that punitive damages were warranted because the Defendant, who knew or should have known of the safety defects, had acted intentionally and recklessly, by continuing to market and sell the Caravan as particularly safe for families with children.

About three weeks before the trial, the Plaintiffs filed a trial brief advocating jury instructions pertaining to the manufacturer's liability, not only for harm caused by a pre-sale failure to warn of the defective seating, but also for a post-sale failure to warn. More specifically, the Plaintiffs argued that a jury charge on post-sale failure to warn was warranted because many Caravan owners had notified the Defendant after 1998 about the poor performance of the seats in relatively minor accidents. The Plaintiffs sought permission to

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[2] In this state, the purpose of a complaint is to provide notice of a claim; "minimum general facts that would support a potential cause of action" are necessary. Wicks v. Vanderbilt Univ., M2006-00613-COA-R3-CV, 2007 WL 858780, at *13 (Tenn. Ct. App. Mar. 21, 2007).

introduce as evidence several documents arising from telephone calls to "Cares," a call-in service offered by the Defendant to its customers. Some 385 instances were brought to the attention of the trial court in the pretrial proceedings. Many of these complaints involved collisions into the rear of the minivans where the front seats had yielded or collapsed in a backward manner, and a passenger was injured as a result. In several instances, children sitting behind the yielding seats were seriously injured. Following these reports, engineers employed by the Defendant inspected the vehicles and provided their findings to the company.

Shortly before the trial, the Defendant filed a reply brief, arguing that this state did not recognize a post-sale duty to warn and citing an unpublished opinion from the Court of Appeals as authority for that proposition. Irion v. Sun Lighting, Inc., No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *17 (Tenn. Ct. App. Apr. 7, 2004) ("Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee had not adopted those provisions and, in any event, Ms. Irion's proof would not trigger those duties."). The Defendant further objected to the admission of the complaints on hearsay grounds.

At the conclusion of a pretrial hearing, the trial court held that the ruling in Irion did not preclude the application of the most recent version of the Restatement and permitted an alternative claim under the post-sale duty to warn theory. Because the trial court concluded that the telephone complaints about the seats were not to be admitted to prove the truth of the matter asserted, but to establish that the Defendant had adequate notice of the potential danger, thirty-seven of these

complaints were held to be admissible. Twelve of the complaints were prior to the Plaintiffs' purchase of the Caravan. Twenty-five occurred afterward and, therefore, were only relevant to the theory of recovery based upon post-sale duty to warn. At trial, this evidence was presented as a part of the Plaintiffs' proof. At the conclusion of the testimony, the trial court instructed the jury to consider the complaints of the similar accidents only for the limited purpose of establishing that the Defendant was aware of the potential defect in the seats of the Caravan.[3] Ultimately, the jury determined that the Defendant failed in its duty to issue warnings both prior to the sale of the vehicle and afterward, and awarded compensatory damages.

The Tennessee Rules of Civil Procedure allow for alternative pleadings:

> A party may set forth two (2) or more statements of a claim or defense alternately or hypothetically. When two (2) or more statements are made in the alternative and one (1) of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may

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[3] The Defendant filed a motion for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure with regard to the post-sale duty issue. This motion was denied by the trial court and, later, also denied by the Court of Appeals. See Flax v. DaimlerChrysler Corp., No. M2005-01768-COA-R3-CV, 2006 WL 3813655, at *3 (Tenn. Ct. App. Dec. 27, 2006).

> also state as many separate claims or defenses as he or she has, regardless of consistency.

Tenn. R. Civ. P. 8.05(2) (2007); Barnes v. Barnes, 193 S.W.3d 495, 501 (Tenn. 2006) ("[A]lternative pleadings are expressly permitted, regardless of consistency."); see also Worley v. Weigel's, Inc., 919 S.W.2d 589, 594 (Tenn. 1996) ("An alternative pleading may not be used as an admission."). Like the trial judge, I believe that in these circumstances the Plaintiffs were entitled to present alternative theories of recovery as to duty to warn and that there was material evidence to support the verdict of the jury as to the viability of either claim. See Cover v. Cohen, 461 N.E.2d 864, 871 (N.Y. 1984) (stating that whether a duty to warn arises depends on the "degree of danger which the problem involves and the number of instances reported").

The relevant section of the Restatement provides as follows:

> (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
>
> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
>
> (1) the seller knows or reasonably should know that the product poses a

> substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement (Third) of Torts: Products Liability § 10.[4]

In my assessment, a post-sale duty comports with both public policy and traditional tort theory. The many jurisdictions recognizing a duty of post-sale failure to warn agree that a claim for damages should be permitted when the manufacturer is aware that the product is defective or unreasonably dangerous after the sale and fails to take reasonable steps to warn those buyers who have purchased the

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[4] One commentator has described the Restatement Third of Torts' summary of products liability law as "the most important development in the past three decades for those who must live in the 'nuts and bolts' world of product liability law." Victor E. Schwartz, The Restatement (Third) of Torts: Products Liability: A Guide to its Highlights, 34 Tort & Ins. L.J. 85 (1998). This Court has previously looked to the Restatement Third for guidance as to tort law in Tennessee. See, e.g., Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 129 (Tenn. 2004).

product. See, e.g., Luvick v. Wil-Rich, 588 N.W.2d 688, 693 (Iowa 1999); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 645-46 (Md. 1992); Comstock v. Gen. Motors Corp., 99 N.W.2d 627, 634 (Mich. 1959); see also, Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 18 (1999). The first state to recognize the duty to warn arising after a sale was Michigan. In a case involving defective breaks in the 1953 model Buicks, the Michigan Supreme Court held that a manufacturer, who after a sale discovers a latent defect in its product, may have the responsibility "to take all reasonable means to convey effective warning to those who" have already purchased the product. Comstock, 99 N.W.2d at 634. Since this decision, a growing number of states have recognized that a manufacturer's responsibility to try to prevent foreseeable harm to its consumers does not terminate at the time of the sales transaction. On occasion, it is essential for companies to actively issue "warnings about risks discovered after sale . . . to prevent significant harm to persons and property." Restatement (Third) of Torts: Products Liability § 10, cmt. a. A post-sale warning reduces "the chance of injury by equalizing the asymmetry of information between the parties." Luvick, 588 N.W.2d at 693. Because of its specialized knowledge and frequent dealings with a product, the manufacturer is in a far better position than the consumer to discover hidden defects that are not apparent to either the buyer or seller when a product is first sold. See Comstock, 99 N.W.2d at 634.

The requirements for a post-sale duty to warn differ from a pre-sale duty in more ways than just the timing of the transaction. Because it costs more to identify and warn consumers after the sale than before the product leaves the seller's control, see Patton, 861 P.2d at 1313, a jury should be required to conduct a cost-benefit analysis when assessing liability. Restatement (Third) of Torts: Products Liability § 10(b)(4). Other factors to consider include the kind of the warning to be issued, the people to whom it is to be given, the nature of the industry, the degree of the potential harm that may result, the difficulty in locating purchasers of the product, whether the warning will be heeded if given, the potential life of the product, the kind of product involved, and the number sold. See, e.g., Rekab, Inc. v. Frank Hrubetz & Co., 274 A.2d 107 (Md. 1971); Comstock, 99 N.W.2d at 634; Cover, 461 N.E.2d at 871; Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915 (Wis. 1979). These authorities recognize that there is not "an absolute continuing duty, year after year, for all manufacturers to warn of a new safety device which eliminates potential hazards." Kozlowski, 275 N.W.2d at 923. Whether harm was foreseeable after a manufacturer knew or should have known of a latent defect is a key issue. See Olson v. Prosoco, Inc., 522 N.W.2d 284, 288-89 (Iowa 1994). As a threshold determination of whether a post-sale duty may arise in a given case, trial courts should "carefully examine the circumstances for and against imposing a duty to provide a post-sale warning." Restatement (Third) of Torts: Products Liability § 10 cmt. a.

Considering the manner in which the post-sale duty to warn has been described by other jurisdictions, I am persuaded that its function and

goals are compliant with the state of tort law in Tennessee. Consumer protection is always a priority. Further, in my view, the language of our statute defining a "product liability action" does not preclude a credible claim made under a post-sale duty to warn. Tenn. Code Ann. § 29-28-102 (2000) (stating that product liability actions include a "breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent") (emphasis added).

In this case, there was material evidence for a reasonable jury to find a post-sale duty to warn. There was testimony as to each of the four elements. With regard to the first, a reasonable juror could have determined that the Defendant, fully aware of the complaints from its customers, knew or should have known that the seats in its minivans posed a substantial risk of harm. Because buyers of the Caravan would have been readily identifiable, and it can reasonably be assumed that the drivers would not know that the seats would yield so dramatically in a rear-end collision, the second element was satisfied. See Comstock, 99 N.W.2d at 634 (imposing liability for post-sale failure to warn against an automobile manufacturer because of latent defects in the automobile). The third element was met because the Defendant could have issued warnings about the potential for injury to those occupants located directly behind the defective front seats. Fourth and finally, considering the nature of the reported injuries–serious bodily harm to children–a reasonable juror could have found that "the risk of harm is sufficiently great to justify the burden of providing a warning."

As stated, it is my view that the trial court did not err by admitting for notification purposes only the twenty-five similar incidents that occurred after the sale of the Caravan. For this reason, I believe the harmless error analysis in the lead opinion with regard to this evidence is unnecessary; otherwise, I fully concur.[5]

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[5] By concurring with the majority, I am especially mindful that under our constitution, "the right of trial by jury shall remain inviolate." Tenn. Const. Art. I, § 6. The right to trial by jury has its origin in the common law and in the Constitution of North Carolina at the time of the formation and adoption of the Tennessee Constitution in 1796. Patten v. State, 426 S.W.2d 503 (Tenn. 1968); Garner v. State, 13 Tenn. (5 Yer.) 159 (1833). The right to jury includes the entitlement to have all factual issues resolved during a trial. Hurt v. Earnhart, 539 S.W.2d 133 (Tenn. Ct. App. 1976). It guarantees that the issues of fact will be determined by twelve jurors properly instructed by the trial court. State v. Garrison, 40 S.W.3d 426 (Tenn. 2000); see also Grooms v. State, 426 S.W.2d 176 (Tenn. 1968). Although not generally applicable to litigation of an equitable nature, the right to jury must not be hampered by conditions or encumbrances. Smyrna v. Ridley, 730 S.W.2d 318 (Tenn. 1987); Neely v. State, 63 Tenn. (4 Baxt.) 174 (1874). Most importantly, a jury verdict limits the scope of review on appeal, as Justice Holder has so accurately acknowledged; this court is limited to determining whether there is material evidence to support the verdict, and, in making that determination, we must take the strongest legitimate view of all the evidence in favor of the verdict, allowing all reasonable inferences in its favor and discarding all inferences to the contrary. Crabtree Masonry Co. v. C & R Constr., Inc., 575 S.W.2d 4 (Tenn. 1978). The right to trial by jury is too precious to ignore. Our duty, in general, is to yield to the will of a well-informed jury, which has seen and heard first-hand the quantity and quality of the evidence, rather than conduct and independent review from a written record. To substitute our judgment for that of the jury

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GARY R. WADE, JUSTICE

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denigrates the importance of this basic principle in our system of jurisprudence.

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

JULY 12, 2006 Session

JEREMY FLAX, ET AL. v. DAIMLERCHRYSLER CORPORATION, ET AL.

Direct Appeal from the Circuit Court for Davidson County

No. 02C-1288

Hamilton V. Gayden, Jr., Judge

No. M2005-01768-COA-R3-CV

This appeal comes from a wrongful death action brought by the parents of an infant child who died from injuries suffered in an automobile accident. In 2001, the mother was one of several passengers involved in a collision in which a man, driving his pickup truck and speeding, rear-ended the minivan occupied by mother and her infant son. The plaintiff parents' infant son suffered a fatal injury when his head collided with the head of another occupant of

the vehicle, who was seated in the passenger seat directly in front of the child and whose seat fell backwards during the accident. The mother and father of the deceased child brought suit against the manufacturer of the minivan and the man who drove the truck that struck the minivan. The parents' claims against the manufacturer were for wrongful death of their son as a result of the manufacturer's defective design of the front seat backs in the minivan and failure to warn of the defect, and the mother also brought a claim against the manufacturer for negligent infliction of emotional distress as a result of witnessing her son's injury. The jury found for the parents and awarded them $5 million in compensatory damages for the wrongful death claim, and awarded the mother $2.5 million for her negligent infliction of emotional distress claim. The jury also found that the manufacturer had acted recklessly and was liable for punitive damages. The trial court bifurcated the trial, and the jury returned a $98 million punitive damages verdict against the manufacturer. The trial court remitted the punitive damage award to $20 million. The manufacturer filed a timely notice of appeal to this Court alleging several errors at trial: that the parents' complaint contained an invalid *ad damnum* clause; that the plaintiff mother had not satisfied the proof requirements for a negligent infliction of emotional distress claim; that there was insufficient evidence of recklessness to support an award of punitive damages; that the trial court improperly recognized a post-sale duty to warn in Tennessee; numerous evidentiary errors and alleged discovery abuse warranting a mistrial; and excessive damage awards. We affirm in part and reverse in part.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Theodore J. Boutrous, Jr., of Los Angeles, CA, Thomas H. Dupree, Jr., of Washington, D.C., and Lawrence A. Sutter, of Franklin, TN, for the Appellants.

Gail Vaughn Ashworth, of Nashville, TN, James E. Butler, Jr., of Atlanta, GA, George W. Fryhofer III, of Atlanta, GA, and Leigh Martin May, of Atlanta, GA, for the Appellees.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts concerning the automobile accident central to this litigation are not in dispute. On June 30, 2001, Defendant Louis Stockell, Jr. ("Stockell") was driving his pickup truck on Old Charlotte Pike in Davidson County, Tennessee. Plaintiff Rachel Sparkman ("Ms. Sparkman") and her infant son, Joshua Flax ("Joshua") were occupants of a 1998 Dodge Caravan ("the Caravan") minivan which was pulling out of a residential driveway onto Old Charlotte Pike. Ms. Sparkman's parents owned the minivan, and her father, Jim Sparkman ("Grandfather Sparkman") was driving the vehicle. Joe McNeill ("McNeill"), a friend of the family, sat in the passenger seat, and Joshua was sat in a child-safety seat directly behind McNeill. Ms. Sparkman sat in the seat next to Joshua and directly behind the driver's seat. Sitting in the back

row of seats were Ms. Sparkman's mother and McNeill's wife.

As Grandfather Sparkman drove the Caravan onto Old Charlotte Pike from the driveway, he noticed Stockell speeding toward the vehicle and drove into the oncoming lane of traffic to avoid a collision. As he did so, Stockell also moved into the oncoming lane of traffic and collided with the rear of the Caravan. At the time of impact, McNeill's seat fell backward and McNeill's head collided with Joshua's. This collision resulted in skull and brain injuries to Joshua from which the child died the next day. None of the other occupants of the minivan were seriously injured.

On May 7, 2002, Ms. Sparkman and Joshua's father, Jeremy Flax ("Flax," collectively, "Plaintiffs" or "Appellees"), filed a complaint against both DaimlerChrysler Corporation ("DCC," "Chrysler," or "Appellant"), as manufacturer of the vehicle, and Stockell. Plaintiffs alleged wrongful death under four theories: negligence of DCC, strict liability in tort of DCC, fraudulent concealment of defect and misrepresentation by DCC,[1] and negligence of Stockell.

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[1] Initially, Ms. Sparkman's parents, as owners of the minivan, had been included as plaintiffs in the lawsuit. Their claim of fraudulent concealment and misrepresentation was allegedly based upon their buying the Caravan in reliance upon DCC's advertisements that stressed the safety features of the minivan. However, Joshua's grandparents eventually dropped their claim, and they were dismissed voluntarily as parties by court order on October 29, 2004, pursuant to Tennessee Rule of Civil Procedure 41.01. Plaintiffs Rachel Sparkman and Jeremy Flax filed a recast complaint on October 25, 2004.

Plaintiffs' claim of negligence against DCC alleged that it had breached its duty "to exercise reasonable care to design, test, manufacture, inspect, market, distribute, and sell the Caravan free of the unreasonable risk of physical harm to prospective owners, users, and occupants, including plaintiffs." Plaintiffs' claim under strict liability alleged that the design of the front seat backs in the Caravan made the seats defective and unreasonably dangerous. Plaintiffs asserted that "[t]he front seats and seat backs in the 1998 Dodge Caravan lacked the strength and structural integrity to hold . . . [Grandfather Sparkman and McNeill] in an upright and stable position during a rear-end collision in a foreseeable impact." Plaintiffs further alleged that DCC knew that the design of the front seats rendered them defective or unreasonably dangerous, and that DCC should be held liable for "advertising and marketing the 1998 Dodge Caravan in an attempt to induce families with children to purchase the 1998 Dodge Caravan and to place their children behind seats which are designed to collapse in rear end collisions." Ms. Sparkman claimed to have relied upon DCC's representations as to the safety of placing children behind these seats when she placed Joshua in his car seat behind the front passenger seat. Plaintiffs claimed that DCC knew, or should have known, from its own testing and from other incidents of injuries to minivan occupants, "that the front passenger seat and seat back would fail, collapse, give way, or bend backwards in foreseeable rear-end collisions and that serious injury to the vehicle occupants could result." Plaintiffs' claim against Stockell asserted that he had been negligent in speeding, failing to maintain his vehicle, failing to keep a proper lookout, and failing to maintain a safe

and reasonable distance behind the Caravan, and that his negligence together with the negligence and design defects of DCC caused Plaintiffs' injuries.[2]

Plaintiffs sought compensatory damages for the wrongful death of their son, including damages for Joshua's mental and physical suffering, general damages for the full life of Joshua, and damages for loss of filial consortium, as well as punitive damages. Ms. Sparkman individually sought damages for negligent infliction of emotional distress ("NIED"). Plaintiffs did not set forth a specific dollar amount sought in compensatory damages, but instead used the language "in an amount to be determined by the enlightened conscience of the jury and as demonstrated by the evidence . . . ." Similarly, Plaintiffs designated the amount sought in punitive damages against DCC to be "an amount to be determined by the enlightened conscience of the jury

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[2] On October 29, 2003, DCC filed a motion for sanctions against defendant Stockell for his failure to appear at depositions and for his failure to respond to interrogatories. DCC requested sanctions in the form of denying Stockell the opportunity to raise any defenses at trial and testify to any matters in the lawsuit. The trial court entered an order granting DCC's motion for sanctions against Stockell, which Plaintiffs did not oppose, on July 15, 2004. This order excluded Stockell from testifying at trial or otherwise presenting defenses to Plaintiffs' claims against him. The fault of Stockell was therefore pre-determined by the trial court, and the jury was instructed that "[t]he Court finds Louis Stockell was at fault." The verdict form presented to the jury for its Phase One deliberation was already marked "Yes" to the question, "Do you find the defendant Louis A. Stockell, Jr., to be at fault?". The allocation of fault, however, was left for determination by the jury, which found DCC and Stockell to each be 50% at fault.

to be sufficient to punish [it] and deter it from similar future conduct."

On August 6, 2002, in light of discovery requests to DCC from Plaintiffs, the trial court entered a sharing protective order, which applied to those documents that DCC considered "proprietary and competitively sensitive, and that it wishe[d] to protect from dissemination." The nature of these documents varied greatly and included depositions of customers involved in other litigation against the company, DCC testing data related to the specific seat in question (which Chrysler referred to as the "NS" model), DCC records detailing specific complaints from customers about the seat's performance in accidents, DCC's own accident investigation reports in response to these complaints, and police reports and photographs from accidents involving automobiles equipped with the seat. The evidence relating to injuries from occasions of NS seat "collapse," or "yield," alleged by other customers was referred to by the parties and the trial court as "other similar incident," or "OSI," evidence. DCC filed a motion in limine regarding the OSI evidence, seeking to exclude the exhibits as irrelevant. The trial court conducted extensive pre-trial hearings dealing with the admissibility of this evidence. Of the several hundred incidents related to NS seat failure, and based upon Plaintiffs' offers of proof through collaborative research by their expert witness Kenneth Saczalski, the trial court ultimately determined that only 37 of these OSI's were substantially similar enough to the Flax accident to be relevant on the issues of dangerousness or defect, or notice to DCC.

On October 4, 2004, DCC argued its motion for summary judgment on the issue of punitive damages, which the court denied. On October 28, 2004, in response to the trial court's allowing Plaintiffs' post-sale duty to warn claim to proceed, DCC filed a motion and accompanying memorandum with this Court for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, seeking a continuance of the November 1, 2004, trial date. This Court denied the motion in a mandate issued on December 7, 2004.

Trial began in circuit court in Davidson County on November 3, 2004, before the Honorable Hamilton V. Gayden, Jr. and a jury. Recurring issues at trial involved the tendency of the NS seats to "yield" or "collapse" in rear-end accidents. Plaintiffs alleged that this design in fact increased the risk of injury to passengers who sat in the second row of seats behind the NS seats, and that stiffer, more rigid seats, such as the ones found in the 1996 Sebring, should have been utilized in the minivan that would be resistant to "collapse" in rear-end accidents. Plaintiffs claimed that DCC's own testing of its minivan seats made it aware of the danger to passengers located behind the NS seats in rear-end collisions, as did many complaints from consumers who had experienced similar problems with the seats.

Another important aspect of Plaintiffs' case was the alleged inadequacy of Federal Motor Vehicle Safety Standard 207 ("FMVSS 207"), which is the government standard for seat back strength that was established by the National Highway Traffic Safety Administration ("NHTSA"). Plaintiffs argued that DCC's undisputed compliance with FMVSS 207 did not shield it from liability for negligence or strict

liability, because FMVSS was a static test, and accidents were often dynamic events, meaning that both vehicles are moving. Plaintiffs argued that FMVSS 207 was "meaningless and tells us nothing about what happens in car wrecks." They argued that DCC's own engineers were aware of the deficiency of this standard, and further, that DCC designed seats that were significantly stronger than the NS seats in the 1996 Sebring and 1998 Ram pickup truck, but that DCC chose not to implement stronger seats into minivans until the 2001 "RS" seat.

DCC claimed that the NS was purposefully designed this way to prevent seat occupants from absorbing energy from a collision, and instead allowing the seat itself to absorb this energy by "yielding," which would minimize the risks of injury to the seat occupant. DCC maintained that its "yielding" design was preferable to a stiffer, more rigid design, because the latter would create a higher risk of head and neck injuries to a seat occupant in accidents, and especially when the occupant was "out of position." DCC claimed to have based its design decision on the relative statistical infrequency of rear-end accident fatalities. DCC argued that its yielding design was not unusual within the industry because a yielding seat design was present in most vehicles.

Plaintiffs began their case by showing the jury the videotaped deposition of Neville D'Souza, a DaimlerChrysler seat engineer who had designed the model seats for the original 1984 Chrysler minivans and who had certain expertise with later models of Chrysler minivan seats, including the NS seats at issue. Other videotaped testimony showed by

Plaintiffs included depositions of other DCC employees from both the present case and from other cases in which DCC had been involved.[3] Plaintiffs' first live witnesses included the Caravan passengers involved in the Flax accident and eyewitnesses to the accident. Plaintiffs called two expert witnesses, Ronald Kirk, a consulting engineer whose primary focus was investigation, analysis, and reconstruction of motor vehicle collisions, and Kenneth Saczalski, a consulting biomechanical engineer who had, since the 1980's, conducted crash tests concerning seat back strength in automobiles. Plaintiffs also called: Colleen Buss, a woman whose child had suffered a skull fracture in an accident involving her 1997 Dodge Caravan; Dr. Joseph Burton, who testified about the injuries that killed Joshua and the possibility that the child had experienced conscious pain and suffering; Paul Sheridan, a Chrysler employee who had been a member of the "NS Body Minivan Complexity Team" in the 1990's; and Vanderbilt University professor William Damon, who was hired by Plaintiffs as an expert in finance and economics to ascertain the present value of lost income suffered by Joshua. Plaintiffs called individually father Jeremy Flax and mother Rachel Sparkman, who testified regarding his and her relationship with Joshua.

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[3] These witnesses were Andrew Foster, a Chrysler employee whose deposition testimony from the case of Buller v. DaimlerChrysler was shown, and Mitchel Porterfield, a Chrysler call center employee who was deposed for the Flax case. Porterfield's testimony indicated that Chrysler had received customer complaints about minivan seat backs as far back as the 1980's.

DCC's defense began with the testimony of Gregory Stephens, an engineer specializing in collision research and analysis. DCC next called Gary Moore, a Nashville firefighter and EMT who responded to the Flax minivan accident. DCC concluded their case with the expert testimony of Michael James, a mechanical engineer and accident investigator, who provided testimony regarding seat back design and strength, and David Blaisdell, a research engineer who also analyzed automobile accidents. Both experts testified about beneficial aspects of the NS seat design to occupants, as well as certain injury risks to passengers that might increase from incorporating a stiffer design.

On November 15, 2004, DCC argued its motions for directed verdict as to the NIED claim, asserting that Sparkman had failed to satisfy her prima facie case by not presenting expert testimony, and on the issue of punitive damages, asserting that no reasonable juror could find by clear and convincing evidence that its conduct was reckless, and that it was improper for the court to impose a punitive award against them under a theory of post-sale duty to warn. The trial court denied these motions. On November 16, NHTSA issued a ruling in which it announced its decision to terminate rulemaking procedures for amending FMVSS 207 (regarding seat back strength) pending further study, and the trial court allowed the document into evidence. Trial concluded on November 22, 2004, and the jury returned a verdict for Phase I of the trial finding DCC and Stockell each 50% liable for compensatory damages and awarding Plaintiffs a total of $7.5 million in compensatory damages: $5 million to Plaintiffs for the wrongful death claim and $2.5 million to Ms. Sparkman individually on her NIED

claim, and finding that punitive damages would be awarded based upon a finding of recklessness by DCC. After the verdict, DCC argued its motion to set aside the part of the judgment awarding punitive damages, which the trial court overruled. On November 23, 2004, the jury returned a verdict for Phase II of the trial, awarding $65.5 million and $32.5 million, for the wrongful death and NIED claims respectively, against DCC in punitive damages.

On January 20, 2005, DCC filed a motion notwithstanding the verdict on punitive damages and negligent infliction of emotional distress, "and for a new trial on all other issues." DCC argued these motions before the trial court on March 18, 2005. On April 28, 2005, some four months after the trial was over, DCC filed a supplemental motion seeking to have the judgments vacated for Plaintiffs' alleged failure to include a valid *ad damnum* clause in their complaint. DCC also filed a motion for a new trial based upon Plaintiffs' alleged failure to produce discovery materials related to tests performed in previous litigation by their expert, Saczalski, on the RS dual recliner seat – materials which showed the tendency of these seats to yield in a manner similar to the NS seat. The trial court denied these motions and remitted the punitive award to $20 million in its July 11, 2005 final order and judgment, but it denied Plaintiffs any discretionary costs as a sanction for failure to discover the Sebring tests. Plaintiffs accepted the remitted punitive award under protest. Appellant filed a timely notice of appeal to this Court on July 22, 2005.

II. ISSUES PRESENTED

On appeal, the issues raised for consideration by this Court, as we perceive them, are as follows:

1. Whether Plaintiffs' complaint adhered to the *ad damnum* clause, or statement of damages, requirement per T.C.A. § 29-28-107 for a products liability action brought in Tennessee;

2. Whether the evidence put forth by Ms. Sparkman for her NIED claim could support an award based upon this theory;

3. Whether the trial court improperly recognized a post-sale duty to warn in Tennessee;

4. Whether there was sufficient proof to support a jury finding of recklessness by DCC that warranted the imposition of punitive damages;

5. Whether evidentiary errors of the trial court or discovery misconduct by Plaintiffs require this Court to order a new trial; and

6. Whether the damage awards in this case were excessive or unconstitutional. For the following reasons, we affirm in part and reverse in part.

III. DISCUSSION

A. Ad Damnum Clause

Appellant first alleges that it was error for the trial court to enter judgment for Plaintiffs when Plaintiffs' complaint did not contain a valid *ad damnum* clause stating the amount of damages sought. DCC claims that because Plaintiffs' complaint prayed for damages "in an amount to be determined by the enlightened conscience of the jury," rather than a specific dollar amount, that the trial court was "powerless" to enter judgment on

their claim. DCC alleges that the language used by Plaintiffs in their complaint falls short of the requirements of T.C.A. § 29-28-107 for a statement of damages in a products liability action, and that it was error for the trial court to find the clause legally sufficient.

Appellees contend that their complaint met the requirements of T.C.A. § 29-28-107, because they stated "an amount" of damages sought. Plaintiffs argue that DCC's contention that this statute "requires a plaintiff to request a specific dollar sum" is neither supported by the wording of the statute or Tennessee common law. Plaintiffs accuse DCC of placing undue reliance on Tennessee cases that express the rule that "where a plaintiff requests a specific dollar sum in its complaint, the plaintiff cannot recover a judgment in excess of that specific sum." Appellees argue that these cases are immaterial because Appellees did not receive a verdict that exceeded the amount sought in the complaint, but rather a verdict in the exact amount of damages sought in the complaint. Appellees finally propose that even if DCC's argument is correct, that it is deemed to have waived the issue by not raising it in its answer, via pretrial motion, or at trial, but for the first time "five months after the trial and verdict."

"Under Tennessee law, a trial court may not enter a judgment in excess of the amount sought in the plaintiffs complaint." *McCracken v. City of Millington*, No. 02 A01-9707-CV-00165, 1999 Tenn. App. LEXIS 185, at *26 (Tenn. Ct. App. March 17, 1999) (citing *Gaylor v. Miller*, 166 Tenn. 45, 50, 59 S.W.2d 502, 504 (1933)). Rule 12.08 of the Tennessee Rules of Civil Procedure states: "A party waives all

defenses and objections which the party does not present either by motion as hereinabove provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto . . . ." TENN. R. CIV. P. 12.08 (2006).

In 1978, the General Assembly enacted the "Tennessee Products Liability Act," which is codified at T.C.A. §§ 29-28-101-108. *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925 (Tenn. 1991). T.C.A. § 29-28-107 (2006) provides special pleading requirements for actions brought under the Act, and states: "Any complaint filed in a products liability action shall state an amount of such suit sought to be recovered from any defendant." The Act contains a section defining its key terms, and the term "product liability action" is defined to include:

> all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. "Product liability action" includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other

> substantive legal theory in tort or contract whatsoever[.]

T.C.A. § 29-29-102(6) (2006). An action for wrongful death has been held to fall within the scope of this definition. *See, e.g.*, Milligan *v. American Hoist and Derrick Co.*, 622 F. Supp. 56, 58 (W.D. Tenn. 1985).

It is clear that T.C.A. § 29-28-107 controls the pleading of damages in this case. As Plaintiffs alleged a defective or unreasonably dangerous seat back design and warning, they were required to state an amount of damages sought. Neither Plaintiffs nor Defendants, however, have cited to any cases in this jurisdiction that have addressed whether the requirements under this section mandate the pleading of a *specific* dollar amount in a products liability action brought in Tennessee.

The cases that Appellant cites in support of its position are readily distinguishable from the situation presently before us. In response to Appellees' arguments that any post-trial challenge to the sufficiency of the *ad damnum* clause has been waived, Appellants correctly state that "challenges based on an *ad damnum* clause are properly raised in a defendant's post-trial briefing[,]" however the cases that DCC cite for this proposition involve the appellate review of a specific type of *ad damnum* challenge: one that attacks the propriety of an entry of judgment in excess of a specific dollar amount articulated in the original complaint. *See Russell v. City of Lawrenceburg*, No. 01-A-01-9505-CV-00200, 1995 Tenn. App. LEXIS 703 (Tenn. Ct. App. Nov. 1, 1995); *Baker v. Kline*, 1988 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 23, 1988).

The rationale for allowing appellate review in such cases is not applicable in this case. A defendant

would logically have no basis to support an *ad damnum* challenge to a judgment in excess of a specific amount stated in the complaint until after the entry of judgment that did in fact exceed this amount. In this case, however, DCC's challenge is to the sufficiency of Plaintiffs' *ad damnum* clause itself. DCC could easily have raised such a challenge in their June 2002 answer, at which time the trial court might have allowed Plaintiffs to amend their complaint to state a specific sum. *See, e.g. Roberson v. Motion Indus.*, No. E2004-02310-C0A-R3-CV, 2005 Tenn. App. LEXIS 391 (Tenn. Ct. App. July 7, 2005) (plaintiff amended *ad damnum* clause from $2 million to $3.4 million); *Guess v. Maury*, 726 S.W.2d 906, 908 (Tenn. Ct. App. 1986) (after defendants filed their answers, plaintiffs amended their complaint to increase their *ad damnum* clause). Instead, Appellant chose to pursue this challenge for the first time nearly three years later, after many months of discovery, a trial lasting over two weeks, and even four months after the trial had concluded. We therefore hold that DCC waived this defense under Rule 12.08 of the Tennessee Rules of Civil Procedure.

The trial court denied DCC's motion for a new trial based on the *ad damnum* clause challenge in its June 23, 2005 memorandum opinion. The court found that since "the plaintiffs did state that they were seeking damages in a specific amount 'to be determined by the enlightened conscience of the jury . . . ,'" and since there were "no cases on point in Tennessee that state that when damages are requested, but there is not a specific sum stated, the judgment is void[,]" Plaintiffs had satisfied the requirements of T.C.A. § 29-28-107. Since we have found that DCC waived this defense by not raising it in its answer pursuant to Rule 12.08 of the

Tennessee Rules of Civil Procedure, we need not review the correctness of this finding.

B. Negligent Infliction of Emotional Distress

The next issue that Appellants raise for our consideration is whether the evidence offered at trial was sufficient to support an award to Ms. Sparkman for negligent infliction of emotional distress. DCC asserts that it is entitled to judgment on the NIED claim because Ms. Sparkman failed to introduce expert testimony to support this claim. DCC states that because Ms. Sparkman's claim was a "stand-alone" claim, the heightened proof requirements established by our supreme court in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996), demanded that she put on expert medical or scientific proof of her emotional injury.

Conversely, Ms. Sparkman argues in support of the award that her NIED claim was not a stand-alone claim, but one of "multiple claims for damages," and was thus excepted from the heightened proof requirements of *Camper*. In support of this proposition, she cites *Estate of Amos v. Vanderbilt University*, in which our supreme court acknowledged that the *Camper* heightened proof requirements did not apply to all NIED claims, but only those determined to be "stand-alone." 62 S.W.3d 133, 137 (Tenn. 2001). Ms. Sparkman rationalizes, and the trial court found, that her claim was one of multiple claims of damages related to the wrongful death claim, including filial consortium, and therefore that the heightened proof requirements for stand-alone claims were not applicable to this NIED claim.

The application of the law to the facts found by the trial court is a question of law that this Court reviews de novo. *State v. Maclin*, 183 S.W.3d 335, 343 (Tenn. 2006) (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)). The trial court in the present case, in denying DCC's post-trial motion for judgment notwithstanding the verdict on Ms. Sparkman's NIED claim, agreed with her characterization of the claim as not being "stand-alone." In its June 20, 2005 memorandum opinion, the court stated:

> In this case, the Court finds that expert proof was not necessary since Rachel Sparkman's NIED claim was not a stand-alone claim. Ms. Sparkman's NIED [sic] was derivative of her claim as a co-plaintiff for the wrongful death of Jeremy [sic-Joshua] Flax. In addition to Ms. Sparkman's NIED claim, she also brought a claim for damages resulting from the loss of filial consortium resulting from Joshua's death. Since Ms. Sparkman brought multiple claims for damages, her NIED claim is not considered by the Court to be stand-alone. The Court also finds that there is sufficient evidence to support Ms. Sparkman's NIED claim. The emotional distress of seeing her young child fatally injured in a car accident would clearly meet the requirements of the tort and would be seen as a severe injury. Therefore, the Court is of the opinion that Rachel Sparkman's claim for NIED was properly before the Court

> and her claim did not require any additional expert proof.

We assign error to the trial court's finding that Ms. Sparkman's claim was not stand-alone, and we therefore hold that Ms. Sparkman failed to meet the proof requirements of *Camper* for a stand-alone NIED claim by not presenting expert medical or scientific proof of her emotional injuries.

In light of the complexities involved when dealing with emotional and mental forms of damages, the legal history of the negligent infliction of emotional distress action in Tennessee is replete with decisions that evince the efforts of our courts to maintain a remedy that strikes a proper balance between the prevention of frivolous suits and the allowance of legitimate claims for emotional damages.[4] In 1996, the Tennessee Supreme Court definitively set forth the requirements for bringing a successful NIED claim in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996). In *Camper*, the plaintiff had been operating his truck when a teenage driver, the defendant, had pulled her own vehicle in front of the plaintiff unexpectedly. *Id.* at 439. The plaintiff

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[4] Early NIED cases in Tennessee, the most notable of which was *Memphis St. Ry Co. v. Bernstein*, 194 S.W. 902 (Tenn. 1917), held that plaintiffs in these cases needed to prove a physical injury as a result of the emotional distress in order for their claims to be actionable. *See Bernstein*, 194 S.W. at 903 ("For the bodily pain and suffering produced by such fright and thereby proximately resulting from the accident, a recovery was permissible. For fright alone the plaintiffs below were not entitled to recover, and the charge which authorized a computation of damages based upon fright alone was erroneous . . . .").

had collided with the defendant, and the defendant was killed instantly. *Id.* The plaintiff had approached the defendant's vehicle immediately after the accident and viewed the defendant's dead body in the wreckage. *Id.* The plaintiff sued the defendant's estate, claiming that as a result of viewing the body he had "sustained mental and emotional injuries resulting in loss of sleep, inability to function on a normal basis, outbursts of crying and depression." *Id.* While the plaintiff had undergone some psychiatric treatment, he did not offer any expert medical evidence of his alleged emotional injuries. *Id.*

The court acknowledged its concern about a developing trend of inconsistent treatment of NIED claims in Tennessee cases over the years, particularly as to whether an accompanying physical manifestation of injury was required. *See Camper*, 915 S.W.2d at 444-46. The court explained that while it had never overruled *Bernstein* and its "physical manifestation" requirement, it had carved out exceptions to this requirement over the years:

> At a very early stage in the law's development, this Court carved out an exception to the physical manifestation rule by holding, in *Hill v. Travelers Ins. Co.*, 154 Tenn. 295, 294 S.W. 1097 (1927), that a plaintiff could recover for mental damages occasioned by the defendants' mutilation of her husband's dead body during an autopsy, notwithstanding that the plaintiff had neither suffered a contemporaneous physical injury nor exhibited physical symptoms of her alleged mental

> injuries. This Court explained its departure from the *Bernstein* rule by simply stating "that mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument." Hill, 294 S.W. at 1099. *See also Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S.W. 574 (1888) (establishing a similar exception where message carrier failed to deliver telegraphs to plaintiff regarding the imminent death of her brother, thus preventing her from sitting by his bedside when he died).

Camper, 915 S.W.2d 437, 444 (Tenn. 1996). The court went on to explain that the inconsistent treatment of NIED claims under *Bernstein* was not only evident in "creating outright exceptions to the *Bernstein* rule[,]" but that in some cases the Tennessee courts had simply applied the physical manifestation rule "in such a way as to soften its potential harshness." *Id.* at 444-45 (citing *Johnson Freight Lines, Inc. v. Tallent*, 53 Tenn. App. 464, 384 S.W.2d 46 (1964) (where the court shifted its focus to the quality of evidence presented in support of the plaintiff's claim instead of the physical manifestations of injuries); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982) (where the plaintiffs had ingested water contaminated with chemicals, and although a medical investigation revealed that no damage had been done, the court held that a jury could conclude that a physical injury had been sustained "when a

plaintiff has ingested an indefinite amount of a harmful substance").

In response to what it referred to as the "confusing" and "unpredictable" state of the law surrounding a negligent infliction of emotional distress claim at this time, the *Camper* court held that it was time "to abandon the rigid and overly formulaic 'physical manifestation' or 'injury' rule[,]" and set forth a new test for meeting a prima facie case for an NIED claim in Tennessee. *Camper*, 915 S.W.2d at 446. The court held that this type of claim was to be addressed under a general negligence approach, and further expounded:

> In other words, the plaintiff must present material evidence as to each of the five elements of general negligence -- duty, breach of duty, injury[,] or loss, causation in fact, and proximate, or legal, cause[. . .]-- in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for "serious" or "severe" emotional injury.[. . .] A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[. . .] Finally, we conclude that the claimed injury or impairment *must be supported by expert medical or scientific proof*.[. . .]

Camper, 915 S.W.2d at 446 (emphasis added) (citations omitted). The Camper court then remanded the case to the trial court for further proceedings. *Camper*, 915 S.W.2d at 446.

In *Estate of Amos v. Vanderbilt University*, 62 S.W.3d 133 (Tenn. 2001), plaintiff Julie Amos (Amos), was a woman who had, prior to the establishment of HIV-testing procedures for blood used in transfusions, contracted the HIV virus after receiving a transfusion of contaminated blood from the defendant hospital in 1984. *Estate of Amos*, 62 S.W.3d at 135. Years later, while still unaware of her HIV-positive status, Amos gave birth to a child who had contracted the virus *in utero*, and the child died of an AIDS-related illness about a month later. *Id.* at 135. In 1991, Amos and her husband brought an action against the hospital, asserting multiple claims for damages including wrongful birth, negligence, and negligent infliction of emotional distress. *Id.* In 1992, Amos died of AIDS, and her husband continued her claims on the behalf of her estate, alleging that the hospital was liable for its failure to warn Amos of her possible infection. *Id.* After a jury verdict, the trial court held that the estate's award for emotional injuries could not stand because the plaintiffs had not presented expert or scientific testimony of serious or severe emotional injury as required by *Camper*, and the court reduced the jury award to reflect only the amount of Amos's medical and funeral expenses. *Id.*

Upon review, the defendants in *Estate of Amos* urged the Court of Appeals to affirm the trial court's decision on NIED, because the plaintiffs had not satisfied *Camper*'s requirements of "expert medical or scientific proof and serious or severe injury." *Id.*

at 136. The court explained: "The special proof requirements in *Camper* are a unique safeguard to ensure the reliability of stand-alone' negligent infliction of emotional distress claims." *Id.* at 136-37. The court went on to state that "[w]hen emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." *Id.* at 137. The court characterized *Camper* as contemplating "a plaintiff who was involved in an incident and received only emotional injuries." *Id.* Noting that the plaintiffs' claims for wrongful birth and negligent failure to warn included "a request for damages for emotional injuries stemming from those causes of action as well as a request for other damages[,]" the court found that the plaintiffs' NIED claim was not "stand-alone," and therefore the heightened proof requirements of Camper did not apply. *Id.* at 137-38.

In *Dodson v. Saint Thomas Hospital*, No. M2004-01102-C0A-R3-CV, 2005 WL 819725 (Tenn. Ct. App. Apr. 7, 2005), a case arising after *Estate of Amos*, the appellant had been fired from her job at a hospital, and she sued the hospital and two employees alleging both intentional and negligent infliction of emotional distress. *Id.* at *1. After affirming the trial court's granting of a summary judgment motion in favor of the defendants on the intentional infliction of emotional distress claim, we turned to the negligent infliction of emotional distress claim in light of precedent:

> As to the claim for negligent infliction of emotional distress, our Supreme Court has outlined the prima facie case for

> negligent infliction of emotional distress. In order to make such a case, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause. *See Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996). In *Camper*, the Court further held that recovery for negligent infliction of emotional distress claims, *where there is no physical injury*, is limited to serious or severe emotional injury supported by expert medical or scientific proof. *Id.* From our review of the record, Ms. Dodson has provided no scientific or medical proof to meet the burden of establishing an injury under this tort. Consequently, summary judgment was correct on these causes of action.

Id. at *8 (emphasis added). The expert proof requirement of Camper has been similarly noted in other NIED cases in Tennessee. *See, e.g., Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 52 (Tenn. 2004) (stating that in Tennessee, an NIED claim requires "that the plaintiff establish the elements of a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation. . . In addition, the plaintiff must establish the existence of a serious or severe emotional injury that is supported by expert medical or scientific evidence. . . ." (citations omitted)); *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999) (recognizing "that legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury" and holding that "when the conduct complained of is

negligent rather than intentional, the plaintiff must prove the serious mental injury by expert medical or scientific proof" (citing *Camper*, 915 S.W.2d at 446)).

We believe that the facts of the present case correspond more closely with *Camper* than with *Amos*. Accordingly, the policies articulated in *Camper* lead us to conclude that Ms. Sparkman did not satisfy the prima facie case for an NIED action in Tennessee. The precedent concerning the proof requirements for NIED claims suggests that when there are not multiple claims for damages by a plaintiff that would deem an NIED cause of action "parasitic," the action is stand-alone, and the heightened proof requirements set forth in Camper will control. *See Dodson*, 2005 WL 819725, at *8; *accord Estate of Amos*, 62 S.W.3d at 137 ("The subjective nature of 'stand-alone' emotional injuries creates a risk for fraudulent claims."); *see also Isabel v. Velsicol Chemical Co.*, 327 F. Supp. 2d 915, 920 (W.D. Tenn. 2004) ("Notwithstanding the general language of *Amos*, under *Laxton*[, 639 S.W.2d 431], it appears that emotional distress damages may not be 'parasitic' upon property damages alone, because the plaintiffs in *Laxton* suffered property damage based upon diminished value, but the Court still required them to prove some de minimis 'physical injury' . . . ."); *but see Riley v. Whybrew*, 185 S.W.3d 393, 401 (Tenn. Ct. App. 2005) (holding that a claim for property damage under a nuisance theory is enough to prevent an accompanying NIED claim from being stand-alone).

While the record reflects that Ms. Sparkman received minor injuries in the accident, including bruises on her legs, a pulled muscle from holding onto the armrest, and a knot on the back of her head,

she sought no recovery for these physical injuries. Ms. Sparkman similarly sought no recovery for any property damage that might have deemed the NIED claim "parasitic" under our analysis in *Riley*, 185 S.W.3d at 401. Ms. Sparkman never offered expert proof of any emotional injuries that might have resulted from her viewing Joshua after the accident. The testimony of Dr. Joseph Burton, a forensic pathologist who testified about the injuries to Joshua from the accident, was asked no questions about Ms. Sparkman's emotional injuries, so he provided no insight for the jury in this regard.

Camper stated that "[a] 'serious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" *Camper*, 915 S.W.2d at 446 (citing *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1010 (5th Cir. 1991); PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 364-65, n.60). During cross-examination, Ms. Sparkman testified that she had received no professional counseling for emotional injuries sustained from the accident. DCC counsel asked Ms. Sparkman, "You have coped with it as best you could on your own?", to which she replied, "I have friends and family that helped me through it."

Furthermore, since the NIED claim was brought as the sole claim by Ms. Sparkman individually, and as a cause of action distinct from the wrongful death claim, which sought filial consortium damages and was brought by the parents jointly, it would be difficult for us to characterize her claim in any way

other than stand-alone. Together with the lack of claims for physical injuries or property damages, the separate nature of these claims persuades us to find that Ms. Sparkman's NIED claim was not "parasitic" of the wrongful death claim, but was instead a stand-alone cause of action brought by Ms. Sparkman individually. Therefore, the NIED claim was not one of "multiple claims for damages" as contemplated by *Estate of Amos*, 62 S.W.3d at 137. Since Ms. Sparkman's NIED claim is one "for a purely mental injury," we believe that it is a stand-alone claim. *See Miller*, 8 S.W. 3d at 614 ("legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury"). As such, it was necessary for Ms. Sparkman to present expert proof of her emotional injuries in order to establish a *prima facie* case for NIED.

While it is difficult for this Court to comprehend the emotional effects of seeing the effects of such a catastrophic injury to one's child after an automobile accident, we believe that to affirm the compensatory and punitive awards for Ms. Sparkman's NIED claim would be in contravention of the proof requirements for a stand-alone NIED claim brought in Tennessee in light of *Camper* and its progeny. For these reasons, we reverse the compensatory and punitive portions of the judgment that correspond with this claim as to defendant DCC.

However as to defendant Stockell, the negligent driver whose truck collided with the Caravan and who neglected to cooperate with the parties during trial and has not joined in this appeal, we affirm the portion of the compensatory NIED award for which he was found liable. As the Western Section of this

Court recently held in *Mairose v. Fed. Express Corp.*, No. W2005-01527-C0A-R3-CV, 2006 Tenn. App. LEXIS 598, at *1849:

> Generally, "[a] reversal is binding on the parties to the suit, but does not control the interests of parties who did not join, or were not made parties, to the appeal . . ." 5 C.J.S. APPEAL & ERROR § 961 (1993). However, when a non-appealing parties' "rights and liabilities and those of the parties appealing are so interwoven and dependent as to be inseparable, . . . a reversal as to one operates as a reversal as to all." Id. In such case, "[w]here less than all of the coparties appeal from a severable judgment in which the interests of the parties are independent, only the part of the judgment pertaining to appellants may be reversed." Id. § 930; see also *Rogers v. Bouchard*, 60 Tenn. App. 555, 449 S.W.2d 431, 438 (Tenn. Ct. App. 1969).

Defendant Stockell did not file an appellate brief with this Court or otherwise join in this appeal. As noted above, Stockell's fault was pre-determined by the trial court in response to his repeated failures to respond to interrogatories or appear at depositions during discovery. In its final order, the trial court entered a judgment against Stockell for $1,250,000 in compensatory damages, which represented his 50% liability on Ms. Sparkman's NIED claim. As we have found that Stockell's rights and liabilities are not so interwoven with or dependent upon those of DCC as to be inseparable, we affirm the

compensatory award of $1,250,000 against him and in favor of Ms. Sparkman individually.

C. Post-Sale Duty to Warn

DCC's also assigns error to the trial court's decision to allow the post-sale duty to warn claim to be presented to the jury as an additional theory of liability against DCC. Appellant argues that the decision by this Court in *Irion v. Sun Lighting, Inc.*, No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004), established that Tennessee does not recognize a manufacturer's post-sale duty to warn. DCC argues that it was deeply prejudiced by the court's recognition of this theory.[5] The first reason, which we shall address in this section, is that the trial court allowed Plaintiffs to impose an additional basis for liability on the wrongful death and NIED claims, in contravention of precedent by this Court in the *Irion* decision.

Appellees counter this theory of error by arguing that *Irion* did not hold that Tennessee would never recognize a post-sale duty to warn, but that it "simply considered the touchstones for post-sale duty to warn set forth in the Restatement (Third) of Torts, noted that Tennessee had not adopted the Restatement, and found that, in any event, the evidence did not satisfy the requirements of the

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[5] Appellants also argue that the jury finding of recklessness in its Phase I deliberation, which in turn would facilitate the award of punitive damages, could have improperly been based upon the post-sale duty to warn theory through the admission of evidence relating to other occurrences of seat failure that occurred after the sale of the Caravan in May of 1998. We address this argument in Section E, below.

Restatement [(Third)]." Plaintiffs argue that this issue is a matter of "purely academic" interest, but vaguely add that they "can hardly imagine a record more suitable to the recognition of that claim." Appellees provide no guidance, however, as to why the instant case is so particularly well-suited to our adoption of this new theory of recovery in Tennessee.

We believe that our statements in *Irion v. Sun Lighting, Inc.*, No. M2002-00766-C0A-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004) are dispositive of this issue. In that case, a plaintiff sought recovery against a lamp manufacturer and a seller of the lamp after her child had placed a pillow over the lamp and started a fire, which resulted in property damage. *Id.* at *1-2. The plaintiff mother brought a products liability suit alleging negligence, strict liability in tort, and breach of implied warranty by the defendants, because the lamp was not equipped with a protective guard over the bulb to prevent combustible materials from catching fire. *Id.* at *2. The plaintiff also proposed several other reasons for imposing liability on the defendants, including the related claims of failure to conduct post-sale testing and breach of a post-sale duty to warn. *Id.* at *52-53. In affirming the trial court's grant of summary judgment for the defendants, this Court stated:

> To the extent she also claims that there was a post-sale duty to warn, we note that, like the majority of states, *Tennessee does not recognize a post-sale duty to warn.* Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee had [sic] not adopted those provisions and,

> in any event, Ms. Irion's proof would not trigger those duties.

Irion, 2004 Tenn. App. LEXIS 210, at *53 (citing Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 21 (1999)).

T.C.A. § 20-9-502 (2006) provides: "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts." Tennessee courts have held on the basis of this statute "that a trial court's erroneous instruction on one count of a multi-count suit is harmless error if its instructions as to the other counts were proper." *Tutton v. Patterson*, 714 S.W.2d 268, 271 (Tenn. 1986) (citing *Tenn. Cent. Ry. Co. v. Umenstetter*, 155 Tenn. 235, 237, 291 S.W. 452, 452-53 (1927); *Bloodworth v. Stuart*, 221 Tenn. 567, 577, 428 S.W.2d 786, 792 (1968)). In Tennessee, "we review the jury charge in its entirety and consider it as a whole in order to determine whether the Trial Court committed prejudicial error. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury." *Cruze v. Ford Motor Co.*, No. 03A01-9907-CV-00245,1999 Tenn. App. LEXIS 833, at *6-7 (Tenn. Ct. App. Dec. 16, 1999) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). Tennessee Rule of Appellate Procedure 36(b) provides for appellate relief only when an error has more likely than not resulted in prejudice to the party. TENN. R. APP. P. 36(b). If no error has occurred, or if the errors that did occur were harmless, then we must affirm the judgment. *Union Planters Nat'l Bank*, 43 S.W.3d at 501 (citing

Doochin v. U.S. Fid. & Guar. Co., 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993)).

Tennessee, like the majority of states, does not recognize a post-sale duty to warn. *Irion*, 2004 Tenn. App. LEXIS 210, at *53. We have found no cases arising after the *Irion* decision that have addressed the particular facts or evidence that might encourage us to adopt this theory of recovery in Tennessee. Appellees' alternative theory of recovery against DCC for the breach of a post-sale duty to warn of possible dangers or defects in its minivan seats should not, therefore, have been submitted to the jury. We find error in the trial court's instruction to the jury on this claim. However, because we find that the trial court correctly instructed the jury on Plaintiffs' remaining theories of recovery under their wrongful death claim, specifically strict liability and negligence, we view its instruction on a post-sale duty to warn claim as harmless error, and we affirm the entry of judgment for Plaintiffs as to the jury's wrongful death compensatory award.

D. Evidentiary Errors and Discovery Abuse

DCC assigns error to the trial court's admission of "other incidents" evidence regarding minivan seatback accidents that the trial court found to be substantially similar to the Flax accident, but which Appellant describes as "irrelevant." DCC alleges that the trial court erroneously deviated from its own articulated standard[6] for substantial similarity when

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[6] At a preliminary motion hearing held on October 25, 2004, the trial court provided the following guidelines for a "substantially similar" incident in this case:

[Footnote continued on next page]

it admitted 37 of these "other similar incidents" (OSI's) into evidence. DCC claims that the trial court also erred in its exclusion of DCC's "real world accident data," which Appellant describes as "highly relevant when evaluating a particular design choice." Furthermore, DCC alleges that Plaintiffs' failure to provide them with certain crash test results of the dual recliner "RS"[7] seat, conducted by Plaintiffs' expert Saczalski for another case in which he testified, prejudiced them and warrants a new trial, which was denied them by the trial court.

Appellees argue that they made a sufficient showing of substantial similarity of the 37 OSIs when offering them into evidence in pretrial conferences. They say that this evidence was extremely relevant in their case against DCC, not only in showing that the defendant had notice of a problem with its NS minivan seats, but also in establishing the existence of a defect in these seats with regard to the strict liability claim. Appellees

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[Footnote continued from previous page]

But I can say that a substantial similarity in this case would be a rear-end collision between two moving vehicles with catastrophic injuries. I won't limit that to passengers in the rear or the middle seats but also to the front seats. If you can cull that down, I would appreciate it.

As far as the force is concerned, it would have to be reasonably near the Delta V forces that happened in this case.

[7] The RS minivan seat design followed the NS design, and was implemented into DCC minivans beginning in the year 2001.

claim that DCC's "real world accident data" was properly excluded by the trial court because DCC did not attempt to make a showing of substantial similarity of the accidents reflected in this data to the Flax accident. Appellees dispute that Saczalski's failure to discover the RS tests warrants a new trial, because the RS seats were not the "safe, non-defective, feasible alternative design advocated by" Plaintiffs and Saczalski. Instead, Appellees insist that the alternative design that Saczalski recommended was the 1996 Sebring seat, which expert testimony amply supported as a stronger alternative to the NS.

1. Admissibility of 37 Other Similar Incidents

"Generally, the admissibility of evidence is within the sound discretion of the trial court." *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992)). "The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of discretion." *Id.* "Under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). "A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining.' *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). "The abuse of discretion standard does not permit the appellate court to

substitute its judgment for that of the trial court." *Id.* (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

"Evidence is relevant and therefore admissible if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005) (citing TENN. R. EVID. 401). "Evidence that is relevant under Rule 401 may be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .'" *Id.* (citing TENN. R. EVID. 403). The key provision of the Tennessee Products Liability Act provides as follows: "[a] manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller." T.C.A. § 29-28-105(a) (2006); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 689 (Tenn. 1995). "Defective condition" is defined at T.C.A. § 29-28-102(2) (2006) as "a condition of a product that renders it unsafe for normal or anticipatable handling and consumption." "Unreasonably dangerous" is defined in T.C.A. § 29-28-102(8) (2006), which states:

> [u]nreasonably dangerous means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the

> product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that the manufacturer or seller knew of its dangerous condition.

Admissibility of evidence of other accidents is a common issue arising in negligence and products liability cases. 1 MCCORMICK ON EVIDENCE § 200, at 800 (Kenneth S. Broun ed., 6th Practitioner's Ed. 2006). In Tennessee, "evidence of other accidents is admissible at trial for two purposes: (1) to show the existence of a particular dangerous condition or (2) to show the defendant's knowledge of the dangerous condition." *Stroming v. Houston's Restaurant, Inc.*, No. 01A-01-9304-CV-00189, 1994 WL 658542, at *2 (Tenn. Ct. App. Nov. 23, 1994) (citing *John Gerber Co. v. Smith*, 150 Tenn. 255, 266, 263 S.W. 974, 977 (1924); *Winfree v. Coca-Cola Bottling Works*, 19 Tenn. App. 144, 147, 83 S.W.2d 903, 905 (1935); *Ellis v. Memphis Cotton Oil Co.*, 3 Tenn. Civ. App. (Higgins) 642, 650 (1913)). Cases in Tennessee have also held that accidents occurring after the one in question may be admissible to show the dangerous nature of the product in question:

> Where the dangerousness or safe character of the place, method, or appliance which is alleged to have caused the accident or injury is in issue, evidence is admissible in a proper case that other similar accidents or injuries, actual or potential, have *theretofore, or at the same time, or thereafter* resulted at or from such place, method, or appliance.

Winfree, 19 Tenn. App. at 147, 83 S.W.2d at 905 (emphasis added), Petition for Certiorari Denied by Supreme Court, June 10, 1935; *see also Graham v. Cloar*, 205 S.W.2d 764 (Tenn. Ct. App. 1947), Petition for Certiorari Denied by Supreme Court October 3, 1947. "If the evidence is being offered to show the existence of a particular hazard or danger, the party seeking to use the evidence must lay a foundation establishing substantial similarity between the prior accidents and the present accident." *Stroming*, 1994 WL 658542, at *2 (citing *John Gerber Co. v. Smith*, 150 Tenn. at 266, 263 S.W. at 977). The similarity requirement does not require that the circumstances of the accidents be identical in every particular. *Id.* at *3 (citing 1 MCCORMICK ON EVIDENCE § 200, at 844 n.4 (John W. Strong ed., 4th Practitioner's Ed. 1992). Sufficient proof of substantial similarity requires

> a showing that the condition or instrumentality that caused the earlier accidents was in substantially the same condition at the time of the earlier accidents as it was at the time of the present accident. *John Gerber Co. v. Smith*, 150 Tenn. at 268, 263 S.W. at 977; *Martin v. Miller Bros. Co.*, 26 Tenn. App. 110, 117, 168 S.W.2d 187, 189-90 (1942). It also requires that the condition or instrumentality shown to be the common cause of the earlier accidents must also be the condition or instrumentality of the present accident. *Turgeon v. Commonwealth Edison Co.*, 630 N.E.2d 1318, 1322 (Ill. App. Ct. 1994).

Id. at *3. "The sufficiency of the showing of similarity of conditions is primarily a matter for the discretion of the trial judge." *Barrett v. Raymond Corp.*, No. 59, 1991 Tenn. App. LEXIS 38, at *4 (Tenn. Ct. App. Jan. 24, 1991) (citing *Powers v. J.B. Michael & Co., Inc.*, 329 F.2d 674 (6th Cir. 1974)).

It is clear from the evidentiary history of this trial that the "condition or instrumentality" considered by the trial court in weighing substantial similarity was the collapse, or yield, of the NS seat that led to the fatal injury to young Joshua. Plaintiffs obtained through discovery a large number of documents from DCC related to hundreds of cases of failure of the NS seats involved in the Flax accident.[8] The judge instructed Plaintiffs to narrow down the "other similar incidents" (OSI's) to only those which could be established as substantially similar to the Flax incident, specifically as to the type of seat involved, the type of accident (rear-end collisions), the degree of injury of the parties, and the force of the collision between the vehicles involved, or "Delta V."[9]

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[8] The Sharing Protective Order filed on August 6, 2002, dealt with the discovery of these documents.

[9] At trial, plaintiff expert Kirk defined "Delta V" as follows:

> Delta is a Greek symbol meaning change. Delta V means change in velocity. Also referred to as speed change or velocity change. In accident reconstruction we're generally talking about an impact.
>
> . . .

[Footnote continued on next page]

In its efforts to determine which documents would be admitted, the trial court conducted several days of pre-trial conferences in which it allowed counsel for Plaintiffs to make a showing of substantial similarity of each incident to the Flax seat and incident, while allowing counsel for DCC to argue in support of their numerous motions in limine in support of excluding the documents concerning incidents that they believed to be dissimilar. By the time the trial began on November 2, 2004, the trial court had admitted into evidence 37 OSI's that were deemed substantially similar to the Flax incident.[10]

We find that the trial court did not abuse its discretion in allowing into evidence the 37 accidents designated as OSI's and submitted by Plaintiffs. The

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[Footnote continued from previous page]
It's simply the change in the speed of the vehicle that occurs during an accident. It's a measure of impact severity.

In Kirk's estimation, based upon the damage to and position of the vehicles after the accident and from his own reconstruction, the Flax minivan had been traveling at between 10-15 miles per hour, and Stockell's truck had been traveling between 50-55 miles per hour at the time of collision. Kirk estimated the Delta V of the collision to be "[a]pproximately 17 to 19 miles per hour."

[10] Upon this Court's review of the expansive record, we perceive the 37 incidents determined by the trial court to be substantially similar as: Amberson, Baird, Bajalia, Basa, Bennett, Berthelson, Bridwell, Buss, Butler, Chism, Collins, Cornelia, Corrigan, Crawford, Dize, Fortney, Hanifee, Henckel, Jones, Kinsey (Odyssey), Labelle, Martin, McCloskey, McCurdy, McMillan, McNeely, Middleton, Munoz, Neal, Persak, Prestridge, Rich, Robinson, Sauceda, Spires, Stanley, and Toothaker.

record reflects that the trial court devoted a considerable amount of time to allow counsel for both parties to voice their support for or objections to this evidence. It is practically indisputable that the injuries occurring in all 37 of these cases were caused by the backward motion of minivan seats, which Plaintiffs sufficiently showed, in each case, to be substantially similar to those at issue in the Sparkmans' vehicle. Therefore, with regard to the trial court's admission of these 37 other accidents as evidence of dangerousness of the NS seat, we affirm the trial court's rulings.[11]

2. Exclusion of "Real-World" Accident Data

DCC also alleges that the trial court erred by refusing to admit, during Phase I, "real-world accident data," specifically data from a NHTSA-run system called "NASS," that would aid its case in showing the jury that rear-end fatalities such as the one in this case "are exceedingly rare and account for only 3 percent of all traffic crash fatalities." According to DCC's expert Mike James, "NASS is a system that is run by NHTSA, by the government agency, where they systematically investigate automobile accidents throughout the country for the

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[11] All 37 of the OSI's, even those occurring after the purchase of the van in 1998 and the accident in 2001, were admissible as evidence of dangerousness of the NS seat. *Winfree*, 19 Tenn. App. at 147, 83 S.W.2d at 905. However, we find that only 12 of the OSI' s occurred prior to the purchase of the Caravan in May of 1998, and therefore only these 12 OSI' s should have been admitted for the dual purpose of showing dangerousness and notice to DCC. In the next section, we discuss how the trial court's failure to provide a limiting instruction to this effect may have affected the jury in its finding of recklessness.

purpose of generating field accident data that can be used by researchers, both within the agency and other researchers[,] to evaluate how vehicles perform in real world accidents." Appellant's counsel made an offer of proof for this evidence before Phase I of the trial began. DCC argued in support of this evidence:

> There is no need to prove substantial similarity. I think we all agree on that, unless you are going to offer it to prove the existence of defect or knowledge on the part of the defendant. . .
>
> We have to show why we made the design choices that we made. And while plaintiffs want to focus on simply rear impacts that injured children, we don't have that luxury as the manufacturer and designer of these seats. . .
>
> So Mr. James' statistical analysis is dissimilar on purpose because we have to show to the jury what kind of harm can happen to occupants in not just the accidents that plaintiffs focus on, rear impacts in which children are hurt, but why we chose the design we did because of the variety of accidents that can occur.
>
> Mr. James is an engineer and he has participated in testing. He is entitled to say that the seats are not unreasonably dangerous and not in a defective condition. He is entitled to say that separate and apart from the

> statistical analysis that he has undertaken – the statistical analysis simply goes to show the jury what kind of harm can occur in rear-end impacts, what kind of harm can occur in frontals, roll-overs, you name it, with whatever kind of occupant and whatever restraint situation you're talking about.
>
> And why DaimlerChrysler decided that out of all of those accidents, the yielding seat produces less harm for occupants than a stiffer seat and that's why they made the design choice they did.

At this pre-trial conference, the trial court granted Plaintiffs' motion in limine to exclude the evidence, but allowed DCC the option of making another offer of proof during Phase E.

At trial, DCC called Mike James to the stand and sought to introduce evidence of the infrequency of vehicular fatalities from seat yielding in rear-end accidents, based upon a study that James had conducted through his analysis of the NASS database. During its direct examination of James, DCC made another offer of proof of the NASS data outside of the jury's presence. During Plaintiffs' cross examination of James, the following exchange occurred:

> Q. Have defense counsel told you that Judge Gayden has already laid down the parameters touched on for what is or is not substantially similar for this trial?
>
> A. No.

Q. So you haven't even discussed that with defense counsel?

A. No. I was told that my analysis of the NASS data was not allowed in.

Q. You're proposing to show this jury some charts based upon other wrecks, and you have not even discussed with defense counsel what the Court has already ruled with respect to what has to be proved before you can talk about other wrecks in this trial? You didn't even talk about that?

A. I have not had a discussion about any type of ruling as to what constitutes substantially similar.

The NASS database upon which James relied upon for his statistical studies contained, by his assessment, in the range of 100,000 different accidents of all types, not just rear-end accidents, involving all types of vehicles.

Neither party has cited to a case in Tennessee state courts in which the parameters have been established for a defendant to introduce the absence or infrequency of accidents as being relevant to the existence or nonexistence of a dangerousness or defect, or as having a bearing on the rationale of a manufacturer for choosing certain design requirements over others. The Sixth Circuit, however, has stated:

> The lack of prior accidents or claims may be admissible to prove the following: (1) the absence of the defect or condition alleged; (2) the lack of a

> causal relationship between the injury and the defect or condition charged; (3) the nonexistence of an unduly dangerous situation; or (4) want of knowledge (or of grounds to realize) the danger.

Hines v. Joy Mfg. Co., 850 F.2d 1146, 1154 (6th Cir. 1988) (citing E. Cleary, McCormick on Evidence § 200 (3d ed. 1984)).

DCC did not specifically articulate any of these reasons for admitting the NASS data in either of its offers of proof at trial, but rather attempted to have the evidence admitted to illustrate the enormous number of variables that a manufacturer must consider when making safety design choices. Ultimately, the trial court stated that the evidence was "just too broad to be relevant" in Phase One. Once again, with regard to our standard of review when considering a trial court's decisions related to evidentiary matters, our supreme court has held:

> In Tennessee[,] admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant[,] trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). We believe that this determination did not constitute an abuse of discretion, and therefore we affirm the decision of the court below to exclude this evidence.

3. DCC's Motion for a New Trial Based Upon Discovery Abuse

DCC moves this Court for a new trial based upon discovery abuse by Plaintiffs in their failing to disclose results from sled tests run on the DCC RS seat in 2002 by their expert witness, Dr. Kenneth Saczalski, during his involvement in a different case against the company. DCC did not discover these results until after trial, and it moved for a new trial. The trial court, in its post-trial memorandum decision, found that Saczalski had admitted in a deposition for another case that during his testing of the Sebring seats, under similar conditions as the accident in the Flax case, "the dummy in the RS dual recliner seat had made contact with the 3-year old surrogate dummy." The trial court found that "Plaintiffs did not disclose a series of RS sled tests conducted by Dr. Saczalski to Defendant DaimlerChrysler." The trial court stated: "The Court finds that the focal point for the discovery abuse was whether or not there was a reasonable alternative to the NS minivan seat. The fact is that DaimlerChrysler manufactured a safer alternative to the NS seat in the Chrysler Sebring vehicle." The court nonetheless sanctioned Plaintiffs under Rule 37 of the Tennessee Rules of Civil Procedure for abuse of the discovery process, denying Plaintiffs "any and all discretionary costs for failing to discover the RS sled tests conducted by Dr. Saczalski in the Neal case[,]" but denied DCC's motion for a new trial, finding that "discovery of the RS sled tests would not have affected the outcome of the trial."

"Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court,

accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." TENN. R. APP. P. 13(d). "A new trial will be granted on account of newly discovered evidence only when it is evident that an injustice has been done and a new trial will change the result." *McCollum v. Huffstutter*, No. M2002-00051-C0A-R3-CV, 2002 Tenn. App. LEXIS 711, at * 19 (Tenn. Ct. App. Oct. 8, 2002). In ruling on a motion for new trial on the grounds of newly discovered evidence, the trial court is vested with wide discretion and its denial of such a motion will not be disturbed by an appellate court unless it has abused its discretion. *Id.* (citing *Evans v. Evans*, 558 S.W.2d 851, 853 (Tenn. Ct. App. 1977)).

Aside from the implausible notion that a corporation of DaimlerChrysler's size and reputation would need to rely upon crash tests conducted by an individual plaintiff's expert in order to facilitate a fully informed preparation of its case, we find DCC's arguments in support of a new trial on this issue to be without merit. Although Plaintiffs did argue that the dual recliner RS design was stronger than that of the NS at issue in this case, their expert Saczalski testified that, in his opinion, these seats were still defective:

> By Mr. Sutter:
>
> Q. Sir, are you endorsing every one of the seats set forth in paragraph 48 [which includes the 2001 RS seat] of your affidavit as nondefective?
>
> A. No, I didn't say that. I said that those would change the outcome to Joshua Flax based on my analysis and testing.

Q. They are still defective though?

A. Yes. In my opinion, they don't provide enough protection for the larger number of people in the population and other more severe accidents than what we have here in Flax.

The 1996 Sebring and the 1998 Ram "belt integrated seat" design was the feasible alternative that Plaintiffs advocated, because unlike the RS seats, these seats were much stiffer and did not "collapse rearward, endangering rear seat occupants."

We agree with the trial court's finding that, regardless of the performance of the RS seats that were added to DCC minivans in 2001, there was a safer alternative design to the NS seat in the 1996 Sebring seat. Testimony provided by DCC's own experts and internal corporate documents admitted into evidence suggest that the company was aware that their own Sebring seats performed better than the NS seats in rear-end crash tests. For example, a 1996 document detailing rear-end crash test results of the Sebring seats by Chrysler's Seat Tech Club stated, "[t]he front seats have performed very well in impact tests, including rearward directions." Neville D'Souza provided testimony, regarding his preparation of a document that compared the performance of DCC seats compared to seats of other companies, which corroborated this assertion upon examination by Plaintiffs' counsel:

Q. And under '96 JX, that's the Sebring; is that correct?

A. Yes.

Q. That's the vehicle that has the all-belts-to-seats design?

A. Yes.

Q. You've written meets dynamic requirements; right?

A. Yes.

Q. But under '96 NS, which is the minivan; correct?

A. Yes.

Q. There is a blank; correct?

A. Yes.

During cross-examination of defense expert David Blaisdell at trial, he admitted the following in response to Plaintiffs' counsel's description of the Sebring seat performance:

Q. You've looked at the Sebring seat test and they don't yield or recline into the rear compartment of the passenger compartment; correct, sir?

A. At their Delta V of 15 or 16 that they were tested at, that's correct.

Q. And the Sebring belt-to-seat seat I believe you testified in static test would test out at some 40 to 50,000 inch pounds;[12] correct, sir?

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[12] This is in stark contrast to the performance of the NS seats, which tested at between 7,000 and 8,200 pounds per inch of torque.

A. That's probably right.

DCC's other expert witness, Mike James, testified on cross-examination as follows:

> Q. Now, isn't it true, sir, that in your opinion if DaimlerChrysler Corporation had put stronger front seats in Jim and Sandra Sparkman's 1998 Dodge Caravan like the Sebring seats, Joshua Flax would be alive today?
>
> A. I don't think he would have had this injury in this accident. I guess I can't testify to what would happen otherwise.
>
> Q. That's fair enough. If DaimlerChrysler had put in the Sparkmans' Dodge Caravan stronger seats like it already had, Joshua Flax would have had no injury in this wreck; isn't that true?
>
> A. Right. There would have been different injuries and different accidents, but it wouldn't have been this injury in this accident.

We find that the evidence preponderates in favor of the trial court's finding that DCC manufactured a safer alternative to the NS seat in the 1996 Sebring. Therefore, we believe that the discovery of the RS tests would not have affected the outcome of this trial, as the RS seat was not Plaintiffs' most preferred design. We find that the trial court's resolution of this issue, in denying Plaintiffs discretionary costs as a sanction, was an appropriate

use of discretion. We affirm the trial court's denial of DCC's motion for a new trial on this issue.

E. Evidence Supporting a Finding of Recklessness

DCC challenges the substantial award for punitive damages under several theories of error. Appellant asserts that its conduct in designing, marketing, and testing its NS seats does not meet the requisite standard for imposing punitive damages in Tennessee, which is the case "involving only the most egregious of wrongs." Appellants challenge the finding of recklessness by the jury in their Phase I verdict, claiming that the record does not support a finding of clear and convincing evidence of conscious wrongdoing. DCC alleges that the Plaintiffs' position, that DCC knew that the NS seats were dangerous to certain passengers in certain accidents, and that differently designed seats were available to DCC and would have been safer in these accidents, ignores the multitude of concerns that its engineers must address when creating a product that will provide the most safety to its consumers. DCC points to the fact that its NS seats exceeded the federal safety standards established by NHTSA for seat strength in accidents, and that this further illustrates the lack of reprehensible conduct that would warrant punitive damages. DCC also challenges the trial court's handling of the post-sale failure to warn claim as it was presented to the jury. Appellant notes that this product liability tort has not been adopted in Tennessee, and that the jury should have not been instructed to consider it prior to its deliberation at the end of Phase I of the trial.

In 1992, the Tennessee Supreme Court set forth the standard that must be met in order for punitive

damages to be imposed against a defendant. *See Hodges v. S.C. Toof and Co.*, 833 S.W.2d 896 (Tenn. 1992). *Hodges* stated that in Tennessee, "a court may henceforth award punitive damages if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." *Id.* at 901. Furthermore, the court held that "because punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by *clear and convincing evidence*." *Id.* (emphasis added) The reasoning provided by the court in establishing this higher standard of proof was to further the underlying purposes of punitive damages, these being punishment and deterrence, and the court stated: "fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence." *Id.* The *Hodges* court went on to explain the trial court's duties in reviewing a punitive award:

> After a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

Id. at 902.

The *Hodges* court defined reckless conduct as taking place when a person "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.* (citing T.C.A. § 39-11-302(c) (1991) (criminal definition of recklessness)). "It takes something far greater than lack of ordinary care to sustain an award for punitive damages." *Richardson v. Gibalski*, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979); *see also Nelms v. Walgreen Co.*, C.A. No. 02A01-9805-CV-00137, 1999 Tenn. App. LEXIS 437, (Tenn. Ct. App. July 7, 1999) (affirming the trial court's ruling that although the evidence "clearly supported a claim of ordinary negligence, the evidence did not support a finding that [defendant pharmacists] engaged in reckless conduct such as to constitute a gross deviation from the required standard of care"); *Anthony v. Construction Products, Inc.*, 677 S.W.2d 4, 9 (Tenn. Ct. App. 1984) (finding that, although the proof introduced was sufficient to create an issue for the jury as to whether a defendant exercised reasonable and ordinary care, the record did not support an award of punitive damages based on recklessness).

It has been established that, under Tennessee law, "a product liability claimant who presents sufficient evidence to satisfy the Tennessee standard for receiving punitive damages will not be foreclosed from such a recovery simply because his cause of action is founded upon a theory of products liability . . ." *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *see also First Nat'l. Bank v. Brooks Farms*, 821 S.W.2d 925, 926 (Tenn. 1991).

In explaining our standard of review for issues of fact that require "clear and convincing" proof, this Court has held:

> Our review of a judgment based upon a jury verdict is governed by Rule 13(d), Tennessee Rules of Appellate Procedure. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict. We note, however, that there is a substantial body of case law that, as a matter of law, requires certain facts be established by clear, cogent and convincing evidence . . . *We will, therefore, when we reach issues requiring the evidence to be clear, cogent and convincing, examine the record to determine if there is sufficient proof to constitute clear, cogent and convincing evidence to support the findings of the jury.*

Shell v. Law, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996) (emphasis added). In another decision by this Court, we stated:

> Whether the "clear, cogent and convincing evidence" standard is imposed by statute *or under the common law* and whether the trial is *by jury* or the trial judge sitting without a jury, appellate courts are required to determine from the record whether or not the party bearing the burden of proof has established that his factual contentions are "highly probable." *Colorado v. New Mexico*, 467 U.S. 310,

> 315, 104 S. Ct. 2433, 2437-38, 81 L. Ed. 2d 247 (1984); *Estate of Acuff v. O'Linger*, 56 S.W.3d 527, 533-537 (Tenn. Ct. App. 2001); *Shell v. Law*, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996).

State v. Layne, No. M2001-00652-00A-R3-1V, 2002 Tenn. App. LEXIS 78, at *17-18 (Tenn. Ct. App. Feb. 1, 2002) (emphasis added); *see also Shahrdar v. Global Hous., Inc.*, 983 S.W.2d 230, 238-39 (Tenn. Ct. App. 1998) (citing *Shell*, 935 S.W.2d at 405) ("In reviewing a jury verdict where the standard of proof required is clear and convincing evidence, this Court must examine the record to determine if there is clear, cogent and convincing evidence to support the findings of the jury."). "In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is 'highly probable' as opposed to merely 'more probable' than not." *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000) (citing *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn. App. 1981); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992)). "In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence." *Id.* (quoting *Hodges*, 833 S.W.2d at 901, n.3).

The verdict form supplied to the jury prior to its Phase One deliberation dealt with the issue of punitive damages by posing the following question: "Do you find, by clear and convincing evidence, that DaimlerChrysler Corporation acted recklessly with regard to the conduct on which you base your finding of liability such that punitive damages shall be

awarded against DaimlerChrysler Corporation?" In response to DCC's post trial motions for judgment on the issue of punitive damages, the trial court articulated its findings supporting the award in its June 23, 2005 revised order entitled "Punitive Damages: Findings of Fact and Conclusions of Law."

We believe that the evidence on the record does not support a clear and convincing showing of the requisite recklessness necessary to impose punitive damages under Hodges, for several reasons.

First, it appears to be undisputed that DaimlerChrysler's NS minivan seats drastically exceeded the standard set by the federal government and required of manufacturers. Appellees argue that DCC's compliance with FMVSS 207 is not enough to protect it from a finding of recklessness, because it is merely a "minimum" standard, and one which DCC and testifying witnesses knew to be "inadequate" for testing rear-end accidents. However FMVSS 207 set the strength requirement of seats in stationary rear-end accidents at 3,300 inch-pounds of torque, and even according to expert Saczalski's testimony on cross-examination, the NS seats tested at more than twice this standard:

> Q. Sir, is it true or not that DaimlerChrysler on their own set their internal goals well above, almost double the standard?
>
> A. As far as seat strength, static seat strength
>
> Q. Yes.
>
> A. – yeah, they did that.

Q. The standard was 3,300 pounds and DaimlerChrysler on their own with no government forcing them to do it, increased it to almost 7,000 pounds or 6,600, somewhere in there?

A. Correct.

Q. When DaimlerChrysler manufactured the seats, they met and surpassed their own internal goal of 6,500 or so pounds; correct?

A. Correct.

Q. And this seat has been tested between 7,000 and 8,200 pounds; correct?

A. Yes. Inch pounds of torque. Inch pounds of torque.

Dr. Saczalski further agreed that the NS seat nearly doubled every standard for seat back strength in the world.

T.C.A. § 29-28-104 (2006) provides:

> Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

As the issues are not presented on appeal, we are not compelled to review the jury's finding of liability against DCC on Plaintiffs' claims under strict liability and negligence. Assuming that the jury found that the presumption against an unreasonably dangerous product was sufficiently rebutted by Plaintiffs' presentation of evidence of trial, however, we cannot ignore that our legislature has afforded a presumption against an unreasonably dangerous product to manufacturers when the product complies with relevant government regulations through its enactment of T.C.A. § 29-28-104. We believe that DCC's compliance with FMVSS 207 weighs heavily in Appellant's favor against a clear and convincing finding of recklessness that might warrant punitive damages.

Furthermore, while DCC might have had notice of possible hazards to children seated behind the NS seats in rear-end accidents, a strong majority[13] of the 37 "other similar incidents," which the trial court allowed into evidence as relevant to either notice by DCC or to dangerousness or defect, occurred *after* the Sparkmans had purchased their Caravan in May of 1998.[14] The timing of these incidents was a point of

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[13] Our review of the 37 other similar incidents admitted into evidence by the trial court leads us to conclude that only 12 of these occurred prior to the purchase of the 1998 Caravan by the Sparkmans. These incidents were: Baird, Bajalia, Butler, Corrigan , Dize, Fortney, McCloskey, McNeely, Middleton, Persak, Robinson, and Sauceda.

[14] We are unable to find within the record a specific date on which the Sparkman purchased the 1998 Caravan. However, the parties appear to have agreed that the purchase occurred in May of 1998.

contention throughout both the discovery process and the trial itself, but the trial court communicated to the parties that it was allowing the 37 substantially similar "OSI's" into evidence as being probative of notice to DCC, and as proof of a defective or unreasonably dangerous condition. As we discussed in the previous section, Tennessee law allows "other accident" evidence to be admitted for this dual purpose, and these 37 incidents were properly admitted as relevant to dangerousness. However, since this state has not yet adopted a post-sale duty upon manufacturers to warn of defective or unreasonably dangerous products, the jury should not have been permitted to consider the OSI's occurring after May 1998 as establishing notice to DCC of injuries from NS seats.

While DCC requested a Phase I jury instruction stating "You may not award punitive damages based on a finding that [DCC] failed to provide a post-sale warning to Plaintiffs," the trial court did not provide such an instruction. The Phase I instruction regarding a post-sale duty to warn was as follows:

> A reasonable person in the manufacturer's position would provide a warning after the time of sale if, one, the seller knows or reasonably should know the product poses a substantial risk of harm to persons or property; and two, those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and three, a warning can be effectively communicated to and acted upon by those to whom the warning might be provided; and three,

> [sic] the risk of harm is sufficiently great to justify the burden of proving a warning.

The trial court waited until Phase II, after punitive liability through recklessness had already been found, to provide the jury with the following instruction: "I instruct you that the plaintiffs are not seeking punitive damages based upon and you must not award punitive damages based upon the conduct of DaimlerChrysler underlying plaintiffs' post-sale duty to warn claim."

The trial court subsequently did not provide the jury with an instruction that limited its consideration of the similar incidents, as they related to notice or knowledge of defect, to those incidents occurring prior to the Sparkmans' purchase of the Caravan:

> The law provides evidence of similar incidents involving the product at issue in this case may be admissible and may be considered for the limited purpose of showing, if it does, the product manufacturer's knowledge or notice of the alleged product defects.
>
> You may consider this evidence only if the similar incidents are similar or substantially similar in terms of the allegation of defect or failure to the design defect or product failure alleged in this case.
>
> By this instruction, the Court does not express any opinion as to whether the product manufacturer has

> had any similar incidents. This is a matter solely for your determination.
>
> If you believe such has been proven, however, you are strictly limited in your consideration of the similar incidents evidence as it relates to the defective product manufacturer's knowledge or notice of the alleged defect.

While we recognize the trial court's patience throughout the trial in dealing with the voluminous evidence of other accidents tendered by Plaintiffs, as well as its thorough efforts to determine which incidents Tennessee law would treat as substantially similar, we find error in the court's failure to instruct the jury that only those injuries involving NS seats which occurred prior to May 1998 could rationally be considered to have imparted notice to DCC.

In light of these considerations, we cannot say that the 12 admitted OSI's occurring prior to the Sparkmans' purchase of the 1998 Caravan clearly and convincingly placed Appellant on such a high degree of notice as to characterize its failure to replace the seats, warn potential buyers of the danger, or otherwise address the issue, as sufficiently reckless behavior to warrant punitive damages under *Hodges*. While the jury could properly have considered all 37 OSI's as being probative of the dangerousness of the NS seat design, only 12 of the incidents allowed into evidence by the trial court could have been known to DCC prior to the purchase of the Sparkman's Caravan.

Further evidence from the record suggests that the loading strength of the NS seat was comparable to that of the seats of other manufacturers whose

minivans were offered for sale in the United States at the time. Under cross-examination at trial, Plaintiffs' expert Saczalski answered questions regarding his deposition responses in the case as follows:

> Q. You might want to go to page 125 line 3.
>
> [reading deposition] Question: At the time of this accident, was [sic] there any other minivans on the market that you believe would have produced a different outcome from Joshua Flax? Answer: Yes. Question: Can you identify those. Answer: The Mercedes-Benz that I showed you earlier, the V class in Europe.
>
> You go on to say that it wasn't available in the United States at the time, and then you talk about the ML 320.
>
> A. Correct.
>
> Q. All right. Now, the ML 320, the minivan that – or the V class that you're talking about, that was that back-to-back minivan that was up very briefly yesterday; correct?
>
> A. Right. Those seats could either be put in back to back or they could be put this [sic] all forward facing.
>
> Q. Not available in the United States at that time? Correct?

A. That was not available at that time, correct.

Q. The ML 320 is actually an SUV; is it not?

A. Yes.

Q. It is not a minivan?

A. Correct.

Q. There were no minivans for sale in the United States in 1998 that had seats that were substantially different than the ones in this particular vehicle, were there, sir?

A. There was, yes. And it was unfortunate that I omitted it, but the Astro van seat carried about 1,800 pounds of load which would be about two and a half times what we have here.

Q. You were asked those same questions under oath and you did not tell us that then, did you, sir?

A. I inadvertently failed to remember that test.

Q. And that was in June of 2004?

A. Correct.

Q. Isn't it true that in 1998 most vehicles on the road probably had a single-sided recliner – I'm sorry, were probably single-sided recliner seats that were tested in the range of about 700 pounds?

A. Most seats were single-sided recliner at that time, but 700 pounds is about the average, so that's not – there were single-sided recliners that were stronger than that and there were some that were weaker than that. This seat kind of fit in the middle. So most vehicles on the road weren't all 700. That happened to be about the average for the single-sided recliners.

Q. So this vehicle was in the average of the predominant number of vehicles on the road?

A. Yes. What I tested.

From this testimony, it is apparent that Saczalski could identify only one type of minivan offered for sale in the United States in 1998 that had substantially different seats from the NS seat in terms of loading strength. Since Tennessee law allows for a jury to consider industry customs and standards in determining whether a product is defective or unreasonably dangerous,[15] we believe

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[15] T.C.A. § 29-28-105(b) (2006) provides, in part:

> 29-28-105. Determination of defective or dangerous condition.
>
> (a) A manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

[Footnote continued on next page]

that such considerations are similarly relevant when determining whether a manufacturer's conduct is reckless.

In *Jarmakowicz v. Suddarth*, No. M1998-00920-COA-R3-CV, 2001 Tenn. App. LEXIS 125 (Tenn. Ct. App. Feb. 21, 2001), we stated:

> This court has recognized the appropriateness of a directed verdict on punitive damages while allowing the jury to determine liability and award compensatory damages on the basis of the higher burden of proof required to support punitive damages and on the basis of the differing character of conduct necessary to meet the Supreme Court's requirement that only the most egregious conduct warrants punitive damages. See, e.g., *Nelms v. Walgreen Co.*, 1999 Tenn. App. LEXIS 437, No. 02 A01-9805-CV-00137, 1999 WL 462145 at *2-4 (Tenn. Ct. App. July 7, 1999) (no Tenn. R. App. P. 11 application filed)

[Footnote continued from previous page]

(b) In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. *Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.*

(emphasis added)

> (plaintiff failed to proved by clear and convincing evidence that defendant acted recklessly although plaintiff established negligence by a preponderance of the evidence, and the trial court properly directed a verdict for the defendant on punitive damages at the close of the proof).
>
> When a court is called upon to determine a motion for directed verdict on punitive damages, the court is "required to determine whether there was material evidence of a clear and convincing nature to support an award of punitive damages," while still taking the strongest legitimate view of plaintiffs evidence. [*Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 919 (Tenn. Ct. App. 1994)].
>
> When considering a motion for directed verdict on punitive damages, a trial court must limit consideration of the evidence in light of this standard, but it must also find the evidence to be clear and convincing.

Jarmakowicz, 2001 Tenn. App. LEXIS 125, at *41-42 (citing *Hughes v. Lumbermens Mut. Cas. Co., Inc.*, 2 S.W.3d 218, 227). Given the evidence offered by Plaintiffs at trial, we believe the trial court should have granted DCC's motion for directed verdict on the issue of liability for punitive damages. While there may be material evidence to support a jury finding of negligence, as well as a defective or unreasonably dangerous product, the culpability attributed to DCC in this case does not clearly and

convincingly approach the "egregious" standard mandated by *Hodges* for allowing punitive damages. For these reasons, the punitive damage awards under both the wrongful death and NIED theories are reversed.

F. Amount of Damages

Finally, Appellants allege that the compensatory awards and the punitive award, which was significantly remitted by the trial court, were excessive and require a remittitur by this Court. As we have already held that punitive damages should not have been imposed based upon the evidence presented at trial, the issue of an excessive punitive award is pretermitted. Similarly, because we have ruled that plaintiff Sparkman did not offer expert proof of serious or severe emotional distress and therefore did not satisfy the prima facie case for a negligent infliction of emotional distress claim, this portion of the compensatory award against DCC is reversed, and Appellant's challenge to this amount as excessive is also pretermitted. We are, therefore, left to address DCC's challenge to the $5 million wrongful death award to the parents of Joshua as being excessive.

Appellant contends, for the first time on appeal, that the $5 million wrongful death award is excessive. DCC argues that Plaintiffs' expert testified that the present value of Joshua's lost income was $1.3 million, and that the remaining $3.7 million of the compensatory award, representing pain and suffering of Joshua and loss of filial consortium by his parents, "is excessive on its face, and was then duplicated in the punitive award." DCC asks that this Court remit the compensatory damage award for these reasons.

We must recognize that Appellant never challenged the amount of the compensatory award in the trial court, nor did they contest their own liability to Plaintiffs on the negligence or strict liability theories underlying the wrongful death claim. Issues not raised in the trial court cannot be raised for the first time on appeal. *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2006) (citing *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991)); *Knoxville's Comty. Dev. Corp. v. Wright*, 600 S.W.2d 745 (Tenn. Ct. App. 1980). Therefore, we affirm the trial court's entry of judgment for $5 million in compensatory damages for the wrongful death of Joshua Flax, the liability for which was apportioned by the jury to be 50% as to each defendant, DCC and Stockell.

IV. CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the judgment of the trial court. We affirm the trial court's denial of DCC's motion for a new trial based upon the *ad damnum* clause issue and the evidentiary issues. As Ms. Sparkman's proof at trial did not satisfy the heightened requirements for a stand-alone negligent infliction of emotional distress claim in Tennessee under *Camper*, the award corresponding with this claim is reversed as to defendant DCC, and affirmed as to defendant Stockell, who did not participate in the trial or this appeal. The remaining judgment entered for $5 million in compensatory damages for wrongful death is affirmed as apportioned by the jury against both DCC and Stockell. The remitted $20 million judgment for punitive damages is reversed. Costs are to be assessed one-half to Appellant, DaimlerChrysler Corporation and its surety, and

one-half to Appellees, Jeremy Flax and Rachel Sparkman, for which execution may issue if necessary.

/s/
ALAN E. HIGHERS,
JUDGE

APPENDIX C

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually; and JEREMY FLAX, individually

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and LOUIS A. STOCKELL, JR.,

Defendants.

FINAL ORDER AND JUDGMENT

This cause came on for trial on the 1st of November 2004, before a jury and the Honorable Hamilton V. Gayden, Jr., Judge of the First Circuit Court of Davidson County, Tennessee. On November 22, 2004, the jury returned a verdict for Phase I of the trial. A copy of that verdict is attached as Exhibit 1. On November 23, 2004, the jury returned a verdict for Phase II of the trial. A copy of that verdict is attached as Exhibit 2.

The Court entered its original Judgment on December 21, 2004. On January 7, 2005, the Court, *sua sponte*, set aside that Judgment in order to file the Court's independent written findings of fact and conclusions of law, relating to the punitive damages awards, in accordance with Hodges v. Toof, 833 S.W.2d 896 (Tenn. 1992). The Court also directed the attorneys to submit proposed findings of fact and conclusions of law within two weeks of the January 7, 2005, Order. Plaintiffs and Defendant DaimlerChrysler Corporation submitted Proposed Findings of Fact and Conclusions of Law as directed. Post-Trial Motions were also filed by plaintiffs and defendant DaimlerChrysler Corporation.

The Court heard initial argument from the parties on post-trial motions and on the Proposed Findings of Fact and Conclusions of Law on March 18, 2005, and the Court heard further argument on those matters on June 9, 2005. After considering all of the filings and argument and the entire record in this cause, the Court issued on June 20, 2005, a Memorandum entitled Punitive Damages: Findings of Fact and Conclusions of Law, and on June 23, 2005, a Memorandum entitled *Revised* Punitive Damages: Findings of Fact and Conclusions of Law. The Court directed counsel for the plaintiffs to prepare a Final Order based upon this Memorandum, as revised.

By Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial entered on June 20, 2005, and *Revised* Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial entered on June 23, 2005, the Court also ruled on all post-trial motions.

Pursuant to T.C.A. § 20-10-102, by filing dated July 5, 2005, plaintiffs accepted under protest the Court's suggestion of remittitur of the total punitive damages assessed against defendant DaimlerChrysler to the sum of $20 million (Twenty Million Dollars) as set forth in the Memorandum entitled Revised Punitive Damages: Findings of Fact and Conclusions of Law and in the Revised Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The Court having independently reviewed the evidence relevant to the issues and being satisfied with and approving the verdict as set forth in the Court's Revised Memorandum Decision: Motion for JNOV, or, In The Alternative, For New Trial, of June 23, 2005, the Court's Revised Memorandum Decision be and hereby is incorporated herein by reference and made a part of this Final Order.

2. The Court having independently reviewed the punitive damages awards and having given consideration to all matters on which the jury is required to be instructed, as set forth in the Court's Memorandum entitled Revised Punitive Damages: Findings of Fact and Conclusions of Law of June 23, 2005, that Revised Memorandum be and hereby is incorporated herein by reference and made a part of this Final Order;

3. Having been advised by the filing of a notice pleading submitted by the plaintiffs entitled Plaintiffs' Acceptance Under Protest of the Trial Court's Suggestion of Remittitur of the Total Punitive Damages Assessed Against Defendant DaimlerChrysler to the Sum of $20 million (Twenty

Million Dollars), the Court hereby makes the acceptance under protest of the remittitur a part of this Final Order. The Court further finds that the jury's percentage allocation of its punitive damages awards to be fairly done in accordance with the evidence and the applicable federal and state law. Therefore, the remitted total of $20 million in punitive damages shall be divided between the two claims on the same percentage basis the jury divided its original total award of punitive damages. Thus the jury's original award of $65.5 million for punitive damages against DaimlerChrysler to plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, for the wrongful death of Joshua Flax is accordingly remitted under protest to $13,367,345.00 (Thirteen Million Three Hundred Sixty-Seven Thousand Three Hundred Forty-Five Dollars). The jury's original award of $32.5 million for punitive damages against DaimlerChrysler to plaintiff Rachel Sparkman, individually, for negligent infliction of emotional distress to Rachel Sparkman is accordingly remitted under protest to $6,632,655.00 (Six Million Six Hundred Thirty-Two Thousand Six Hundred Fifty-Five Dollars).

4. Based on the foregoing, it is further ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of $2,500,000.00 (Two Million Five Hundred Thousand Dollars) against DaimlerChrysler

Corporation for compensatory damages for the wrongful death of Joshua Flax;

B. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of $2,500,000.00 (Two Million Five Hundred Thousand Dollars) against Louis A. Stockell, Jr. for compensatory damages for the wrongful death of Joshua Flax;

C. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of $1,250,000.00 (One Million Two Hundred Fifty Thousand Dollars) against DaimlerChrysler Corporation for compensatory damages for negligent infliction of emotional distress;

D. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of $1,250,000.00 (One Million Two Hundred Fifty Thousand Dollars) against Louis A. Stockell, Jr. for compensatory damages for negligent infliction of emotional distress;

E. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of $13,367,345.00 (Thirteen Million Three Hundred Sixty-seven Thousand Three Hundred Forty-Five Dollars) against DaimlerChrysler Corporation for punitive damages for the wrongful death of Joshua Flax;

F. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of $6,632,655.00 (Six Million Six Hundred Thirty-Two Thousand Six Hundred Fifty-Five Dollars) against DaimlerChrysler Corporation for punitive damages for negligent infliction of emotional distress to Rachel Sparkman;

G. Pursuant to T.C.A. §47-14-122, this Judgment shall bear interest at the legal rate of 10% per annum from November 23, 2004, the date the jury's final verdict was returned;

H. The Court costs assessed by the Clerk be and hereby are divided between Defendant DaimlerChrysler Corporation and the Defendant Louis A. Stockell, Jr., with each Defendant responsible for fifty percent (50%) of the total Court costs assessed by the Clerk. Execution may issue if necessary; and,

I. This is a final Order and there is no just cause for delay.

ENTERED this ____ day of _____, 2005.

_____

HONORABLE HAMILTON V. GAYDEN, JR. CIRCUIT JUDGE

EXHIBIT 1

IN THE CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and LOUIS A. STOCKELL, JR.,

Defendants.

VERDICT FORM

We, the jury, unanimously answer the questions submitted by the Court as follows:

1. A. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim that the product was defective?

   Yes __X__ No _____

   B. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim that the product was unreasonably dangerous?

   Yes __X__ No _____

C. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim for failure to warn at the time of sale?

Yes __X__ No _____

D. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim for post-sale failure to warn?

Yes __X__ No _____

2. Do you find the defendant Louis A. Stockell, Jr., to be at fault?

Yes __X__ No _____

3. Considering all of the fault at 100%, what percentage of the total fault is chargeable to each of the following parties?

DaimlerChrysler Corporation 50 % (0-100%)

Louis A. Stockell, Jr. 50 % (0-100%)

Total <0% or 100%>

4. Without considering the percentage of fault found in Question 3, what total amount of damages, if any, do you find were sustained by the following parties:

Jeremy Flax and Rachel Sparkman as the Natural Parents of Joshua Flax, deceased, for the wrongful death of Joshua Flax:

$5,000 000.00 (five million dollars)

Rachel Sparkman, individually, for negligent infliction of emotional distress:

$2,500,000.00

5. Do you find, by clear and convincing evidence, that DaimlerChrysler Corporation acted recklessly with regard to the conduct on which you base your finding of liability such that punitive damages shall be awarded against DaimlerChrysler Corporation?

Yes X No _____

11/22/04 /s/
DATE PRESIDING JUROR

EXHIBIT 2

IN THE CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and LOUIS A. STOCKELL, JR.,

Defendants.

VERDICT FORM-PHASE II

We, the jury, unanimously answer the questions submitted by the Court as follows:

What amount of punitive damages do you find should be awarded against defendant DaimlerChrysler Corporation on the following claims?

Jeremy Flax and Rachel Sparkman as the Natural Parents of Joshua Flax, deceased, on the wrongful death claim of Joshua Flax:

$65,500,000.00 (65.5 million)

Rachel Sparkman, individually, on the claim for negligent infliction of emotional distress:

$32,500,000 (32.5 million)

11/23/04 /s/

DATE PRESIDING JUROR

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and LOUIS A. STOCKELL, JR.,

Defendants.

REVISED PUNITIVE DAMAGES: FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Joshua Flax was fatally injured on June 30, 2001 when the 1998 Dodge Caravan ("minivan") in which he was riding was hit from behind by a Ford pick-up truck. Jim and Sandra Sparkman, grandparents of Joshua Flax, owned the minivan. Louis Stockell owned the Ford pick-up truck that struck the Sparkman's vehicle.

The impact occurred as the minivan was exiting a residential driveway onto Old Charlotte Pike in Davidson County, Tennessee. Louis Stockell was driving at an excessive speed and was unable to avoid hitting the minivan from behind. During the collision, the minivan seats yielded rearward in a

reclining position. As the seat yielded backwards, contact was made between the front passenger's head and Joshua Flax's head. Joshua's car seat was placed directly behind the front passenger seat and Joshua was forward facing at the time of the accident. The impact caused an indentation in Joshua's forehead. The blunt force to Joshua's head caused him to have severe brain damage that led to his death on July 1, 2001. None of the other occupants in the vehicle had severe injuries from this accident.

The parents of Joshua Flax, Rachel Sparkman and Jeremy Flax, brought a products liability action against DaimlerChrysler Corporation ("DaimlerChrysler") for defective seat design and for the wrongful death of Joshua Flax. Louis Stockell was also named as a defendant for the wrongful death of Joshua Flax.

The jury found that both Louis Stockell and DaimlerChrysler were the legal cause of Joshua's injuries. The jury allocated 50% fault to Mr. Stockell and 50% fault to DaimlerChrysler for the wrongful death of Joshua Flax. The jury awarded a total of $7.5 million in compensatory damages for the wrongful death of Jeremy Flax and for Rachel Sparkman's claim for negligent infliction of emotional distress. In a separate hearing, the jury found by clear and convincing evidence that punitive damages were appropriate against DaimlerChrysler for its reckless conduct. In Phase II of the trial, the jury found that punitive damages should be awarded to the plaintiff in the amount of 98 million dollars against DaimlerChrysler.

CONCLUSIONS OF LAW:

In accordance with Hodges v. Toof, 833 S.W.2d 896, 901 (Tenn. 1992), punitive damages can only be awarded when a defendant acts 1) intentionally, 2) fraudulently, 3) maliciously, or 4) recklessly. In this case, the jury found by clear and convincing evidence that DaimlerChrysler acted recklessly. A person or entity is reckless when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances." Id. at 901. (citing T.C.A. § 39-11-302(c)(1991)).

The jury found that the yielding minivan seats were unreasonably dangerous to front occupants in the vehicle, and young children placed behind these seats. Plaintiff's expert, Dr. Ken Saczalski, found that the minivan seat was "defective and deficient in that it allowed penetration into the rear occupant area where it allowed the child to be severely injured in what [would be considered] a moderate kind of impact." (11/8/04 T. 92/8-19) (PX 446). DaimlerChrysler's own documents and testimony by designer Neville D'Souza demonstrated that DaimlerChrysler had the weakest seat design strength requirement of all the other manufacturers of which it compared itself to. (11/3/04 T. 111/21-113/7) (PX 31).

Evidence and testimony at trial revealed that DaimlerChrysler had knowledge that these seats were unreasonably dangerous. In all of the DaimlerChrysler FMVSS 301 rear impact crash tests, the front seat collapsed backward into the back area where a child would be sitting. (11/8/04 T. 171/19- 174/20). During these tests,

DaimlerChrysler's engineers would actually brace the front seats to prevent the front seats and the dummies from yielding backwards and injuring the testing instruments located behind the front seats. (PX 17) (11/3/04 T. 226/7-228 8).

In addition, DaimlerChrysler had been receiving complaints about seat backs as far back as the mid-1980's. (11/4/04 T 55/3-8, 16-20; 67/3-6) (Roy Porterfield). DaimlerChrysler discovered from these complaints that children were being injured as a result of the yielding seat backs. (Id. at 72/21-73/7). From these calls, DaimlerChrysler was able to ascertain that if a front seat collapses and there is a small child in the back seat then the "child could be impacted by that seat." (Id. at 76/5-11).

As well as the crash tests and customer complaints, the Minivan Safety Leadership Team at DaimlerChrysler had discussed at their meetings issues regarding seat back strength. (11/10/04 T. 44/11-17). At the meeting on March 16, 1993, the attendees agreed, "the proper way to protect customers is to design seats for the real world." (Id. at 49/17-21). The team did not believe that it was sufficient to design seats merely to meet minimum federal seat back strength standard, FMVSS 207. (Id. at 49/22-50/3). The Minivan Safety Leadership Team knew that the "collapsing minivan seat was a significant injury producing problem" and was "aware of the fact that people were being injured or killed in Chrysler vehicles, minivans in particular, where the front seat backs were collapsing as a result of a rear end collision." (Id. at 67/6-9). The leadership team concluded that the minivan seats "were not adequate" to "protect customers." (Id. at 128/10-16). From this evidence it is clear that the

Minivan Safety Leadership Team and DaimlerChrysler had a high degree of notice, knowledge, and concern about the dangers of the seat backs in the minivans.

From the evidence presented at trial, the Court is of the opinion that the jury properly found that DaimlerChrysler acted recklessly and that punitive damages were warranted in Phase I of this case.

During Phase II of the trial, the jury considered the following factors to determine the amount of punitive damages to award:

1) The defendant's financial affairs, financial condition, and net worth;

2) The nature and reprehensibility of defendant's wrongdoing;

3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm ;

4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;

5) The expense plaintiff has borne in the attempt to recover the losses;

6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;

7) Whether, and the extent to which defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (OMITTED)

8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and

9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. Toof, 833 S.W.2d 396 901 (1992).

The Court will address each of the following factors listed above in order to evaluate the appropriateness of the size of punitive damages to award.

1. Defendant's Financial Affairs, Financial Condition, and Net Worth:

The evidence at trial established that DaimlerChrysler's financial condition for the third quarter 2004 was $42.8 billion dollars. (PX 115). This evidence demonstrates that DaimlerChrysler is a company of substantial assets and income. The Court is of the opinion that DaimlerChrysler has resources to pay a substantial punitive damage award to deter future misconduct and wrongdoing.

2. The Nature and Reprehensibility of the Defendant's Wrongdoing:

The court finds that DaimlerChrysler's conduct was indeed reprehensible. DaimlerChrysler was selling and marketing its minivans to families. DaimlerChrysler advertised that, "the minivan was built for children and that Chrysler surrounds the children with safety." (11/30/04 T. 134/2-18) (PX 61). Jim Sparkman testified that this is the very reason that he bought the minivan. He stated that he and

his wife "wanted a vehicle that would be a family vehicle, basically that we could use with our children, our grandchildren...to travel with them." (11/4/04 T. 92/3-9) (Jim Sparkman). Even though DaimlerChrysler was aware that its yielding minivan seats were causing injury and death to children, it still encouraged parents to put children behind these seats. DaimlerChrysler even designed an integrated child seat located directly behind the yielding front seat in some of the late minivan models.

Impact of defendant's conduct on the plaintiff

The impact that defendant's' conduct has had on the plaintiff is horrific. DaimlerChrysler's reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child, Jeremy Flax.

The relationship of defendant to plaintiff

The relationship that the defendant had with the plaintiff was one of manufacturer to consumer. Plaintiffs were consumers who put their faith and trust in DaimlerChrysler to manufacture and sell a safe family vehicle. The plaintiffs were not privy to crash tests and reports that were prepared by DaimlerChrysler highlighting the problem with yielding seats in its minivans. On the contrary, plaintiffs relied solely on information that DaimlerChrysler gave them, and were dependent on DaimlerChrysler to design a safe vehicle and to warn of any problems of which it knew about.

The Court is of the opinion that DaimlerChrysler's reprehensible conduct of concealing and not warning customer of the known

dangers of putting children behind yielding seats supports a substantial jury award.

3. The Defendant's Awareness of the Amount of Harm Being Caused and the Defendant's Motivation Causing the Harm:

The Court finds that DaimlerChrysler was aware of the injuries and deaths caused by the yielding seat backs. DaimlerChrysler had numerous complaints that put them on notice that people were being injured by these seats. DaimlerChrysler's own experts even admitted that in rear impact collisions, the seat backs would go backwards and children would be injured or killed.

The motivation for DaimlerChrysler's conduct was to avoid spending the extra money to fix the problem of a weak seat back design. DaimlerChrysler's documents reflect that installing a dual recliner, which would double the seat strength, would have added seven dollars to the cost of each of the front seats. The Court finds that this factor supports a high punitive damages award.

4. The Duration of the Defendant's Misconduct and Whether Defendant Attempted to Conceal the Conduct:

DaimlerChrysler has had the same type of yielding seat in its minivan for over 20 years. Since the 1980's, DaimlerChrysler has been bracing its seats to avoid injuring instruments and equipment in the back seat. In addition, there have been complaints and claims filed with DaimlerChrysler's call center dating back from the 1980's reporting incidents of seat back failure in its minivans. This evidence shows that for many years now

DaimlerChrysler has had knowledge of the yielding seat backs, and the injuries caused to adults and young children due to the seat back design.

Testimony at trial also revealed that DaimlerChrysler attempted to conceal the information about its seat backs from the public. After the Minivan Safety Leadership Team identified its concern with the yielding seat backs, DaimlerChrysler's response was to retrieve and destroy all the team's minutes that pertained to seat back design. Further, Eric Clark, a DaimlerChrysler executive, testified at trial in Phase II that the public "does not have a right to know everything" that DaimlerChrysler knew. (11/23/04 T. 97/2-11),

He also stated that consumers did not have a right to know "what DaimlerChrysler knew about the dangers and risks." (Id. at 98/10-18).

The court is of the opinion that the duration of the misconduct and the fact that DaimlerChrysler attempted to conceal the misconduct warrants punitive damages in this case.

5. The Expense Plaintiff Has Borne in the Attempt to Recover Its Losses:

The Court is of the opinion that this case has been very expensive to try. Plaintiff's expert testified at trial that he was being paid approximately $200,000 by plaintiff's counsel in connection with his work on this case. In addition, the bulk of plaintiff's trial team was from out of town and they have borne significant travel expenses from the month long trial. The Court finds that the plaintiff's expenses are in the hundreds of thousands of dollars and should be taken into consideration when computing the punitive damage award.

6. Whether Defendant Profited From the Activity, and If Defendant Did Profit, Whether the Punitive Damages Award Should Be in Excess of the Profit in Order Deter Similar Future Behavior:

DaimlerChrysler profited by not making both of its front seats dual recliners. In the 1980's, DaimlerChrysler noted that to redesign the seat backs to prevent them from collapsing would result in a "piece penalty", which would be an increase in cost to change the design. Therefore, the Court finds that DaimlerChrysler did profit from choosing not to change the seat back design. This factor weighs in favor of a considerable punitive damages award.

7. Previous Punitive Damages Awards Based Upon The Same Wrongful Act:

Daimler Chrysler and the plaintiffs jointly consented not to charge the jury on this factor. DaimlerChrysler filed previous punitive damage awards under court ordered seal. The Court retains the sealed document to be opened at a later date once the litigation ends.

8. Whether, Once the Misconduct Became Known to the Defendant, Defendant Took Remedial Action Or Attempted to Make Amends By Offering a Prompt and Fair Settlement for Actual Harm Caused:

There is no evidence that DaimlerChrysler offered a prompt and fair settlement for the actual harm caused. Since the Court knows of no evidence of offers to settle, this factor weighs in favor of the plaintiff for an award of punitive damages.

9. Any Other Circumstances Shown By the Evidence That Bear On Determining the Proper Amount of the Punitive Award:

The Court is of the opinion that the punitive damages award should be reduced to 20 million dollars, a remittitur of 78 million dollars. It has been suggested by the United States Supreme Court that the ratio of punitive damages to compensatory damages should not be greater than 10 to 1. BMW of North America v. Gore, 517 U.S. 559, 581 (1996)(quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The Supreme Court stated, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution...." State Farm v. Campbell, 538 U.S. 403, 425 (2003). Although the United States Supreme Court decided that it would be unable to draw a mathematical bright line rule between the constitutionally acceptable and constitutionally unacceptable, the "general concer[n] of reasonableness...properly enter[s] into the constitutional calculus.'" TXO Production Corp. v. Alliance Resources Corp., et al., 509 U.S. 443, 481 (1993)(quoting Haslip, 499 U.S., at 18)).

The difference between the punitive damages and compensatory damages in this case is 26 to 1. The wide gap between the two ratios is enough to make the Court raise a suspicious judicial eyebrow to the fact that the punitive damages awarded in this case do not comport with due process and are not within a constitutionally acceptable range.

The Court also notes that a lower ratio is appropriate when compensatory damages are substantial. In State Farm, the Supreme Court found that a punitive damages award of 145 million

was not appropriate when the plaintiff received a substantial compensatory damages award. State Farm, 538 U.S. at 429. The Supreme Court stated, "[w]hen compensatory damages are substantial, then a lesser ratio...can reach the outermost limit of the due process guarantee." Id. at 425. In this case, the compensatory damage award was substantial and therefore, a remittitur to the punitive damage award is appropriate.

For these reasons, the Court finds that punitive damages are warranted and supported by the evidence in this case. However, the Court suggests a remittitur in the amount of 78 million dollars. The amount of punitive damages suggested by the Court assessed to DaimlerChrysler is 20 million dollars.

The plaintiffs are directed to draw the final order based on these findings of fact and conclusions of law.

ENTERED this 23 day of June, 2005.

/s/
JUDGE HAMILTON GAYDEN

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and LOUIS A. STOCKELL, JR.,

Defendants.

MEMORANDUM DECISION:

MOTION FOR JNOV OR, IN THE ALTERNATIVE, FOR NEW TRIAL:

The Court overrules the motion for a Judgment Notwithstanding the Verdict ("JNOV") and overrules the motion for a new trial.

The Court suggests a remittitur to the ninety-eight million dollar punitive damages award assessed by the jury against the Defendant Daimler Chrysler Corporation. The Court suggests the amount of punitive damages should be twenty million dollars.

The Court will address some of the pivotal issues raised in the motion for a JNOV and new trial. The Court will also review the second phase, the punitive damage portion, of the trial as required by Hodges v.

Toof, 833 S.W.2d 896 (Tenn. 1992) in a separate memorandum.

I. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED")

A. VERDICT FORM

The Court finds that the jury verdict form was properly submitted to the jury on the issue of whether or not damages should be awarded to the plaintiff for negligent infliction of emotional distress ("NIED"). Daimler Chrysler Corporation ("DaimlerChrysler") argues that the Court must vacate the compensatory and punitive damage award for NIED. DaimlerChrysler's threshold argument is that although the jury form had a blank for the jury to assess damages to the defendants for NIED, there was not a question on the jury form that asked whether or not DaimlerChrysler, was at fault for NIED. The jury form only asked whether DaimlerChrysler was liable on other grounds including: 1) defective produce; 2) unreasonably dangerous product; 3) failure to warn at the time of sale; and 4) post-sale failure to warn. There was no "at fault" question as to whether DaimlerChrysler was liable for Rachel Sparkman's NIED claim.

DaimlerChrysler contends that it would violate due process to impose damages based on conduct to which it has never been found liable.

DaimlerChrysler submits that it was not required to object to the verdict form or ensure that the "at fault" question was included on the form. In DaimlerChrysler's view, NIED should not have been submitted to the jury anyways and they contend that this Court did not properly submit this issue to the jury.

DaimlerChrysler cites to several cases from other jurisdictions to support its position that the NIED claim was improperly submitted to the jury. In Kinnel v. Mid-Atlantic Mausoleums,, Inc., 850 F.2d 958 (3d Cir. 1988), the United States Court of Appeals found that the verdict against the president of a building company could not be sustained since interrogatories to the jury did not purport to assess the president's individual liability. Id. Defendant Mid-Atlantic was in the business of building mausoleums. Id. at 960. Defendant Kennan was the president of Mid-Atlantic. Id. Plaintiff sought damages against defendants for breach of contract and fraudulent misrepresentation. Id. at 959. The jury, in response to written interrogatories, found Defendant Mid-Atlantic liable. Id. There were no questions on the interrogatories submitted to the jury regarding Kennan's individual liability nor did any instructions given to the jury mention liability at against Defendant Kennan. Id. at 959. Although the jury only found Mid-Atlantic liable, the district court entered judgment against both Mid-Atlantic and Kennan. Id. The Court of Appeals found that there was sufficient evidence to support the jury's verdict against Mid-Atlantic but that it was error for the district court to enter judgment against Kennan. Id. at 960.

In Loya v. Wyoming, 99 P.3d 972 (Wyo, 2004), the Wyoming Supreme Court found that the defendant could not be held individually liable for breach of contract when claims were not made against him on the special verdict form. The Court stated, "the special verdict form was not constructed so as to require the jury to address all the claims asserted in the complaint." Id. at 976. The Court went on to state, "the parties are held accountable

for creating and acquiescing to an inartfully drafted jury verdict form." Id. at 979.

In addition, DaimlerChrysler cited to Oliveira v. Ilion Taxi Aero LTDA, 830 So.2d 241 (Fla. Dist. Ct. App. 2002), it which the Florida District Court of Appeals found that an award of punitive damages on a fraud claim was error since the jury did not find liability as to that claim. Id. The District Court also found that the defendants did not waive their objection even though they did not object before the jury was charged. Id.

The Court is of the opinion that the cases cited in DaimlerChrysler's brief are not on point to the situation in this case. In Kinnel, one of the defendants was left off the verdict sheet. Kinnel, 850 F.21 at 959. In this case, there is no question that the jury was aware that DaimlerChrysler was one of the defendants and was listed on the verdict form. In Loya, the jury did not make any findings as to the liability of the defendant on the breach of contract claim because the jury form was not constructed in a way to address all the claims asserted in the complaint. Id. at 976. Here, the underlying liability claim was the same for wrongful death and NIED and the jury specifically awarded NIED damages to Rachel Sparkman on the verdict form. Lastly, in Oliveira, the defendant was not assessed any liability in the underlying case but still the jury came back and awarded punitive damages against the defendant. This is completely different than the present case since the jury did find DaimlerChrysler to be liable. In addition, defense counsel for DaimlerChrysler should have brought to the trial court's attention any objections that they had to the verdict form regarding Rachel Sparkman's NIED

claim. If there was any error, although the Court does not find any reversible error in the verdict form, it was defense counsel's burden to bring any inconsistencies in the verdict form to the Court's attention or else the objection is waived. Keith v. Murfreesboro Livestock Mkt., 780 S.W.2d 751, 759 (Tenn. Ct. Apr. 1989).

B. EVIDENCE SUFFICIENT TO SUPPORT NIED CLAIM

It is the opinion of the Court that Rachel Sparkman's claim for NIED was properly before the jury, and that there was sufficient evidence to support her claim for NIED. Furthermore, the Court finds that expert proof was not necessary in this case since Rachel Sparkman's claim was not stand-alone.

DaimlerChrysler argues that the NIED claim was not supported with expert proof and it was therefore error to submit this claim to the jury. DaimlerChrysler relies on Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996), for the proposition that when a plaintiff seeks to recover damages for NIED, there needs to be some type of expert or medical proof. Id. at 446. The reason for adding this additional element of proof was to combat any fraudulent or frivolous claims that might be brought. Id. Following Camper, the Tennessee Supreme Court concluded that not all NIED claims needed this heightened requirement of expert proof. Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001). The Court stated, [t]he special proof requirements in Camper are a unique safeguard to ensure the reliability of "stand-alone" negligent infliction of emotional distress claims.... When emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of

damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." Id. at 136.

In this case, the Court finds that expert proof was not necessary since Rachel Sparkman's NIED claim was not a stand-alone claim. Ms. Sparkman's NIED was derivative of her claim as a co-plaintiff for the wrongful death of Jeremy Flax. In addition to Ms. Sparkman's NIED claim, she also brought a claim for damages resulting from the loss of filial consortium resulting from Joshua's death. Since Ms. Sparkman brought multiple claims for damages, her NIED claim is not considered by the Court to be stand-alone. The Court also finds that there is sufficient evidence to support Ms. Sparkman's NIED claim. The emotional distress of seeing her young child fatally injured in a car accident would clearly meet the requirements of the tort and would be seen as a severe injury. Therefore, the Court is of the opinion that Rachel Sparkman's claim for NIED was properly before the Court and her claim did not require any additional expert proof.

II. PUNITIVE DAMAGES

The Court finds that it was appropriate to award punitive damages in this case. Under Tennessee law, the Court can only award punitive damages when the defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S.C. Toof, 833 S.W.2d 896, 901 (Tenn. 1992). According to the Tennessee Supreme Court, "[a] person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would

exercise under all circumstances." Id. (citing TENN. CODE ANN. § 39-11-302(c)(criminal definition of recklessness)).

After hearing all the evidence, the jury found that DaimlerChrysler acted recklessly. Evidence at trial demonstrated that DaimlerChrysler was aware that young children were being injured in similar accidents due to seat backs collapsing backwards. DaimlerChrysler did nothing to warn customers of this known danger but instead encouraged parents to put their children in the rear seats directly behind the collapsing seats. In addition, in some of the minivan models, DaimlerChrysler designed an integrated child seat that was located directly behind the front passenger seat. The Court is of the opinion that DaimlerChrysler acted recklessly and punitive damages were warranted in this case.

III. POST-SALE DUTY TO WARN

The Court finds that it was proper to admit evidence related to post-sale failure to warn on the issue of feasibility. Mercedes-Benz had knowledge in their possession that showed the benefits of strong sea backs. When Mercedes-Benz and Chrysler merged in 1998, DaimlerChrysler at that time was able to share and collect information with Mercedes-Benz on seat design and how strong the seatbacks in vehicles should be. Although DaimlerChrysler was privy to this information, they decided not to make their seatbacks as strong as Mercedes Benz. The fact that Mercedes Benz was making a stronger seat shows that it was feasible for DaimlerChrysler to put stronger seats in its minivans as well. Along with the information DaimlerChrysler received from Mercedes Benz, DaimlerChrysler already had a stronger seatback in place in the Chrysler Sebring

vehicle, at the same time that the to NS dual recliner seat was on the market.

In addition, the Court finds that it was appropriate to enter into evidence other similar incidents ("OSI") that occurred after the sale of the Flax minivan. There are other reasons besides a post sale duty to warn to allow subsequent OSIs into the record. Tennessee law allows other similar incidents to be introduced into evidence that occurred both before and after the incident took place. In Winfree v. Coca-Cola Bottling Works, 83 S.W.2d 903 (Tenn. Ct. App. 1935) the court found that it was admissible to have witnesses testify as to what the defendant knew "prior to, about the time, and subsequent to this accident" about exploding Coca-Cola bottles. Id. at 905. Likewise, it was appropriate for the Court in this case to consider prior and subsequent claims of seatback failure that were similar to their injuries in Flax.

SUPPLEMENTAL MOTION FOR JNOV OR NEW TRIAL AND MOTION FOR DISCRETIONARY COSTS:

DaimlerChrysler has filed a motion for a new trial based on newly discovered evidence. In a deposition, in another DaimlerChrysler lawsuit (the Neal case), plaintiff's expert, Dr. Kenneth Saczalski, disclosed that he had conducted a series of sled tests on the dual recliner RS minivan seats in 2002. (The RS minivan seat replaced the NS minivan seat in 2001. The NS model, which is the subject of this lawsuit, was utilized from 1996-2000). Dr. Saczalsk , admitted in the Neal deposition that these tests were conducted under similar conditions as the accident in this case with around a 20 delta-V force. Furthermore, Dr. Saczalski admitted that the

dummy in the RS dual recliner seat made contact with the 3-year old surrogate dummy.

In this case, DaimlerChrysler made a timely discovery request of the plaintiff for "any videos, photos, or tests created or obtained by Plaintiff's experts." See DaimlerChrysler's Second Set of Re 'nest for Production of Documents, at 8. Plaintiffs did not disclose a series of RS sled tests conducted by Dr. Saczalski to Defendant DaimlerChrysler.

DaimlerChrysler has asked the Court to grant a new trial based on plaintiffs abuse of the discovery process. Defendant DaimlerChrysler has argued that disclosure of the sled tests would, or could have resulted in a different outcome at trial. In order for a party to obtain a new trial based on newly discovered evidence, the party must show that the evidence was discovered after the trial was concluded, that the party could not have discovered the evidence on its own with due diligence, that it is material and not merely cumulative or impeaching, and that *the evidence will probably change the result if a new trial is granted*. Crain v. Brown, 823 S.W.2d 187, 192 (Tenn. Ct. App. May 1, 1991)(citing 20 Tennessee Jurisprudence, New Trials §§ 6, 7, 8, 9, and 10) (emphasis added)). The Court is of the opinion that discovery of the RS sled tests would not have affected the outcome of the trial.

The Court finds that the focal point for the discovery abuse was whether or not there was a reasonable alternative to the NS minivan seat. The fact is that DaimlerChrysler manufactured a safer alternative to the NS seat in the Chrysler Sebring vehicle. Further, DaimlerChrysler had access to Mercedes Benz's technology that utilized stronger and safer seat backs in its vehicles.

Nevertheless, the Court sanctions the plaintiffs under Rule 37 of the Tennessee Rules of Civil Procedure for abusing the discovery process. See TENN. R, CIV. P. 37.04(3) (authorizing sanctions for a party who "fails . . . to serve a written response to a request for inspection submitted under Rule 34"). Therefore, the Court denies any and all discretionary costs for failing to discover the RS sled tests conducted by DT. Saczalski in the Neal case.

In addition to the discovery dispute, the Court has also considered DaimlerChrysler's supplemental response seeking a new trial based on the ad damnum clause. DaimlerChrysler alleges that plaintiffs' failure to state a specific amount in their complaint entitles defendant to a new trial. DaimlerChrysler argues that since a specific amount was not alleged in the complaint, the judgment rendered in this case is invalid. The Court disagrees. The Court finds that the plaintiffs did state that they were seeking damages in a specific amount to be "determined by the enlightened conscience of the jury to be sufficient to punish DC and deter it from similar future conduct." See Plaintiffs' Complaint at ¶¶ 51-53, 55. The cases that DaimlerChrysler relies on in its brief state the rule that when a plaintiff requests a sum specific in the complaint, the plaintiff can then not recover a judgment in excess of that specific sum. There are no cases on point in Tennessee that state that when damages are requested, but there is not a specific sum stated, the judgment is void. Therefore, the Court does not find merit in this claim and denies the motion for new trial.

For the foregoing reasons, DaimlerChrysler's motion for JNOV or, in the alternative, for new trial

is denied. The supplemental motions filed by DaimlerChrysler are also denied.

ENTERED this 20th day of June, 2005,

/s/
JUDGE HAMILTON GAYDEN

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; and RACHEL SPARKMAN, individually;

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Defendants.

PUNITIVE DAMAGES: FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Joshua Flax was fatally injured on June 30, 2001 when the 1998 Dodge Caravan ("minivan") in which he was riding was hit from behind by a Ford pick-up truck. Jim and Sandra Sparkman, grandparents of Joshua Flax, owned the minivan. Louis Stockell owned the Ford pick-up truck that struck the Sparkman's vehicle.

The impact occurred as the minivan was exiting a residential driveway onto Old Charlotte Pike in Davidson County, Tennessee. Louis Stockell was driving at an excessive speed and was unable to avoid hitting the minivan from behind. During the collision, the minivan seats yielded rearward in a

reclining position. As the seat yielded backwards, contact was made between the front passenger's head and Joshua Flax's head. Joshua's car seat was placed directly behind the front passenger seat and Joshua was forward facing at the time of the accident. The impact caused an indentation in Joshua's forehead. The blunt force to Joshua's head caused him to have severe brain damage that led to his death on July 1, 2001. None of the other occupants in the vehicle had severe injuries from this accident.

The parents of Joshua Flax, Rachel Sparkman and Jeremy Flax, brought a products liability action against DaimlerChrysler Corporation ("DaimlerChrysler") for defective seat design and for the wrongful death of Joshua Flax. Louis Stockell was also named as a defendant for the wrongful death of Joshua Flax.

The jury found that both Louis Stockell and DaimlerChrysler were the legal cause of Joshua's injuries. The jury allocated 50% fault to Mr. Stockell and 50% fault to DaimlerChrysler for the wrongful death of Joshua Flax. The jury awarded a total of $7.5 million in compensatory damages, for the wrongful death of Jeremy Flax and for Rachel Sparkman's claim for negligent infliction of emotional distress. In a separate hearing, the jury found by clear and convincing evidence that punitive damages were appropriate against DaimlerChrysler for its reckless conduct. In Phase II of the trial, the jury found that punitive damages should be awarded to the plaintiff in the amount of 98 million dollars against DaimlerChrysler

CONCLUSIONS OF LAW:

In accordance with Hodges v. Toof, 833 S.W.2d 896, 901 (Tenn. 1992), punitive damages can only be awarded when a defendant acts 1) intentionally, 2) fraudulently, 3) maliciously, or 4) recklessly. In this case, the jury found by clear and convincing evidence that DaimlerChrysler acted recklessly. A person or entity is reckless when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances." Id. at 901. (citing T.C.A. § 39- 11-302(c)(1991)).

The jury found that the yielding minivan seats were unreasonably dangerous to front occupants in the vehicle, and young children placed behind these seats. Plaintiff's expert, Dr. Ken Saczalski, found that the minivan seat was "defective and deficient in that it allowed penetration into the rear occupant area where it allowed the child to be severely injured in what [would be considered] a moderate kind of impact." (11/8/04 T. 92/8-19) (PX 446). DaimlerChrysler's own documents and testimony by designer Neville D'Souza demonstrated that DaimlerChrysler had the weakest seat design strength requirement of all the other manufacturers of which it compared itself to. (11/3/04 T. 111/21-113/7) (PX 31).

Evidence and testimony at trial revealed that DaimlerChrysler had knowledge that these seats were unreasonably dangerous. In all of the DaimlerChrysler FMVSS 301 rear impact crash tests, the front seat collapsed backward into the back area where a child would be sitting. (11/8/04 T. 171/19- 74/20). During these tests,

DaimlerChrysler's engineers would actually brace the front seats to prevent the front seats and the dummies from yielding backwards and injuring the testing instruments located behind the front seats. (PX 17) (11/3/04 T. 226/7 228/1).

In addition, DaimlerChrysler had been receiving complaints about seat backs as far back as the mid-1980's. (11/4/04 T 55/3-8, 16-20; 67/3-8) (Roy Porterfield). DaimlerChrysler discovered from these complaints that children were being injured as a result of the yielding seat backs. (Id. at 72/21-73/7). From these calls, DaimlerChrysler was able to ascertain that if a front seat collapses and there is a small child in the back seat then the "child could be impacted by that seat." (Id. at 76/5-11).

As well as the crash tests at 1 customer complaints, the Minivan Safety Leadership Team at DaimlerChrysler had discussed at their meetings issues regarding seat back strength. (11/10/04 T. 44 11-17). At the meeting on March 16, 2003, the attendees agreed, "the proper way to protect customers is to design seats for the real world." (Id. at 49/17-21). The team did not believe that it was sufficient to design seats merely to meet minimum federal seat back strength standard, FMVSS 207. (Id. at 49/22-50/3). The Minivan Safety Leadership Team knew that the "collapsing minivan seat was a significant injury producing problem" and was "aware of the fact that people were being injured or killed in Chrysler vehicles, minivans in particular, where the front seat backs were collapsing as a result of a rear end collision." (Id. at 67/6-9). The leadership team concluded that the minivan seats "were not adequate" to "protect customers." (Id. at 128/10-16). From this evidence it is clear that the

Minivan Safety Leadership Team and Daimler-Chrysler had a high degree of notice, knowledge, and concern about the dangers of the seat backs in the minivans.

From the evidence presented a trial, the Court is of the opinion that the jury properly found that Daimler Chrysler acted recklessly and that punitive damages were warranted in Phase I of this case.

During Phase II of the trial, the jury considered the following factors to determine the amount of punitive damages to award:

1) The defendant's financial affairs, financial condition, and net worth;

2) The nature and reprehensibility of defendant's wrongdoing;

3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;

4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;

5) The expense plaintiff has borne in the attempt to recover the losses;

6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award shot id be n excess of the profit in order to deter similar future behavior;

7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (OMITTED)

8) Whether, once the misconduct became known to defendant, defendant took remedial action or

attempted to make amends by offering a prompt and fair settlement for actual harm caused; and

9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. Toof, 833 S.W.2d 996, 901 (1992).

The Court will address each of the following factors listed above in order to evaluate the appropriateness of the size of punitive damages to award.

1. Defendant's Financial Affairs, Financial Condition, and Net Worth:

The evidence at trial established that DaimlerChrysler's financial condition for the third quarter 2004 was $42.8 billion dollars. (PX J 15). This evidence demonstrates that DaimlerChrysler is a company of substantial assets and income. The Court is of the opinion that DaimlerChrysler has the resources to pay a substantial punitive damage award to deter future misconduct and wrongdoing.

2. The Nature and Reprehensibility of the Defendant's Wrongdoing:

The court finds that DaimlerChrysler's conduct was indeed reprehensible. DaimlerChrysler was selling and marketing its minivans to families. DaimlerChrysler advertised that, "the minivan was built for children and that Chrysler surrounds the children with safety." (11/30/04 T. 11: 4/2-18) (PX 61). Jim Sparkman testified that this is the very reason that he bought the minivan. He stated that he and his wife "wanted a vehicle that would be a family vehicle, basically that we could use with our children, our grandchildren...to travel with them"

(1114/04 T. 92/3-9) (Jim Sparkman). Even though DaimlerChrysler was aware that its yielding minivan seats were causing injury and death to children, it still encouraged parents to put children behind these seats.

DaimlerChrysler even designed an integrated child seat located directly behind the yielding front seat in some of the later minivan models.

Impact of defendant's conduct on the plaintiff

The impact that defendant's conduct has had on the plaintiff is horrific. DaimlerChrysler's reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child, Jeremy Flax.

The relationship of defendant to plaintiff

The relationship that the defendant had with the plaintiff was one of manufacturer to consumer. Plaintiffs were consumers who put their faith and trust in DaimlerChrysler to manufacture and sell a safe family vehicle. The plaintiffs were not privy to crash tests and reports that were prepared by DaimlerChrysler highlighting the problem with yielding seats in its minivans. On the contrary, plaintiffs relied solely on information that DaimlerChrysler gave them, and were dependent on DaimlerChrysler to design a safe vehicle and to warn of any problems of which it knew about.

The Court is of the opinion that DaimlerChrysler's reprehensible conduct of concealing and not warning customers of the known dangers of putting children behind yielding seats supports a substantial jury award.

3. The Defendant's I N4 are less of the Amount of Harm Being caused and the Defendant's Motivation in Causing the Harm:

The Court finds that DaimlerChrysler was aware of the injuries and deaths caused by the yielding seat backs. DaimlerChrysler had numerous complaints that put them on notice that people were being injured by these seats. DaimlerChrysler's own experts even admitted that in rear impact collisions, the seat backs would go backwards and children would be injured or killed.

The motivation for DaimlerChrysler's conduct was to avoid spending the extra money to fix the problem of a weak seat back design. DaimlerChrysler's documents reflect that installing a dual recliner, which would double the seat strength, would have added seven dollars to the cost of each of the front seats. The Court finds that this factor supports a high punitive damages award.

4. The Duration of the Defendant's Misconduct and Whether Defendant Attempted to Conceal the Conduct:

DaimlerChrysler has had the same type of yielding seat in its minivan for over 20 years. Since the 1980's, DaimlerChrysler has been bracing its seats to avoid injuring instruments and equipment in the back seat. In addition, there have been complaints and claims filed with DaimlerChrysler's call center dating back from the 1980's reporting incidents of seat back failure in its minivans. This evidence shows that for many years now DaimlerChrysler has had knowledge of the yielding seat backs, and the injuries caused to adults and young children due to the seat back design.

Testimony at trial also revealed that DaimlerChrysler attempted to conceal the information about its seat backs from the public. After the Minivan Safety Leadership Team identified its concern with the yielding seat backs, DaimlerChrysler's response was to retrieve and destroy all the team's minutes that pertained to seat back design. Further, Eric Clark, a DaimlerChrysler executive, testified at trial in Phase II that the public "does not have a right to know everything" that DaimlerChrysler knew. (11/23/04 T. 97/2-11),

He also stated that consumers did not have a right to know "what DaimlerChrysler knew about the dangers and risks." (Id. at 98/10-18),

The court is of the opinion that the duration of the misconduct and the fact that DaimlerChrysler attempted to conceal the misconduct warrants punitive damages in this case.

5. The Expense Plaintiff Has Borne in the Attempt to Recover Its Losses:

The Court is of the opinion that this case has been very expensive to try. Plaintiff's expert testified at trial that he was being paid approximately $200,000 by plaintiff's counsel in connection with his work on this case. In addition, the bulk of plaintiffs trial team was from out of town and they have borne significant travel expenses from the month long trial. The Court finds that the plaintiff's expenses are in the hundreds of thousands of dollars and should be taken into consideration when computing the punitive damage award.

6. Whether Defendant Profited From the Activity, and If Defendant Did Profit, Whether tine

Punitive Damages Award Should Be in Excess of the Profit in Order to Deter Similar Future Behavior:

DaimlerChrysler profited by not making both of its front seats dual recliners, In the 1980's, DaimlerChrysler noted that to redesign the seat backs to prevent them from collapsing would result in a "piece penalty", which would be an increase in cost to change the design. Therefore, the Court finds that DaimlerChrysler did profit from choosing not to change the seat back design. This factor weighs in favor of a considerable punitive damages award.

7. Previous Punitive Damages Awards Based Upon The Same Wrongful Act:

Daimler Chrysler and the plaintiffs jointly consented not to charge the jury on this factor. DaimlerChrysler filed previous punitive damage awards under court ordered seal. The Court retains the sealed document to be opened at a later date once the litigation ends.

8. Whether, Once the Misconduct Became Known to the Defendant, Defendant Took Remedial Action Or Attempted to Make Amends By Offering a Prompt and Fair Settlement for Actual Harm Caused:

There is no evidence that DaimlerChrysler offered a prompt and fair settlement for the actual harm caused. Since this Court knows of no evidence of offers to settle, this factor weighs in favor of the plaintiff for an award of punitive damages.

9. Any Other Circumstances Shown By the Evidence That Bear On Determining the Proper Amount of the Punitive Award:

The Court is of the opinion that the punitive damages award should be reduced to 20 million dollars, a remittitur of 78 million dollars. It has been suggested by the United States Supreme Court that the ratio of punitive damages to compensatory damages should not be greater than 10 to 1. BMW of North America v. Gore, 517 U.S. 559, 581 (1996) (quoting Pacific Mut. La Ins. Co. v. Haslip, 499 U.S, 1, 18 (1991)). The Supreme Court stated, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution...." *State Farm v. Campbell*, 538 U.S. 408, 425 2003). Although the United States Supreme Court decided that it would be unable to draw a mathematical bright line rule between the constitutionally acceptable and the constitutionally unacceptable, the "general concer[n] of reasonableness...properly enter[s] into the constitutional calculus.'" TX° Production Co v. Alliance Resources Corp., et al., 509 U.S. 443, 481 (1993)(quoting Haslip, 499 U.S., at 18)).

The difference between the punitive damages and compensatory damages in this case is 26 to 1. The wide gap between the two ratios is enough to make the Court raise a suspicious judicial eyebrow to the fact that the punitive damages awarded in this case do not comport with due process and are not within a constitutionally acceptable range.

The Court also notes that a lower ratio is appropriate when compensatory damages are substantial. In State Farm, the Supreme Court found that a punitive damages award of 145 million was not appropriate when the plaintiff received a substantial compensatory damages award. State Farm, 538 U.S. at 429. The Supreme Court stated,

"[w]hen compensatory damages are substantial, then a lesser ratio... can reach the outermost limit of the due process guarantee." Id. at 425. In this case, the compensatory damage award was substantial and therefore, a remittitur to the punitive damage award is appropriate.

For these reasons, the Court finds that punitive damages are warranted and supported by the evidence in this case. However, the Court suggests a remittitur in the amount of 78 million dollars. The amount of punitive damages suggested by the Court assessed to DaimlerChrysler is 20 million dollars.

The plaintiffs are directed to draw the final order based on these findings of fact and conclusions of law.

ENTERED this 20th day of June, 2005,

/s/

JUDGE HAMILTON GAYDEN

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

JEREMY FLAX ET AL.

v.

DAIMLERCHRYSLER CORPORATION ET AL.

No. M2005-01768-SC-R11-CV

ORDER

The appellee, Daimler Chrysler Corporation ("DCC"), has filed a petition for rehearing of the opinion released on July 24, 2008. We have considered all of the arguments raised in the petition and have concluded that they are without merit. Accordingly, the petition for rehearing is denied.

Justice Koch adheres to his conclusions expressed in his separate concurring and dissenting opinion released July 24, 2008, that the record does not contain clear and convincing evidence to support the jury's finding that DaimlerChrysler acted recklessly and that the admission of evidence regarding incidents involving third parties was not

harmless because it enabled the jury to punish DaimlerChrysler for injuries to persons who were not before the court. Accordingly, he would grant the petition for rehearing and reverse the judgments for both punitive and compensatory damages and remand the case for a new trial on the issue of compensatory damages.

Justices Clark and Wade continue to adhere to the views expressed in their separate opinions, also released on July 24, 2008.

In addition, the appellants Jeremy Flax and Rachel Sparkman have filed a motion asking this Court to condition any further stay of mandate upon DCC's posting a surety bond. Upon due consideration, the appellants' request to condition any further stay upon DCC's posting of a surety bond is hereby denied.

It is so ORDERED.

PER CURIAM

APPENDIX E

In the
Supreme Court
of Tennessee

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs and Appellants,

v.

DAIMLERCHRYSLER CORPORATION, Defendant and Appellee, LOUIS A. STOCKELL, JR., Defendant.

No. M2005-01768-SC-R11-CV

Davidson Circuit Court No.: 02C-1288

PETITION FOR REHEARING OF DAIMLERCHRYSLER CORPORATION

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II. REHEARING IS WARRANTED BECAUSE THE COURT FAILED TO ADDRESS TWO OF DCC'S ARGUMENTS.

Rehearing is also warranted for the simple reason that the Court has not yet addressed or ruled upon two of the arguments for reversal that DCC raised in its briefs.

First, at every stage of this litigation, DCC has argued that it is entitled to a new trial on punitive damages based on the improper jury arguments of Plaintiffs' counsel, who (a) urged the jury to punish DCC for its litigation conduct, (b) told jurors that they bore an "immense burden" to "keep children out of the hospitals and out of the morgues" and would bear personal responsibility for future deaths unless they returned a large award, and (c) argued—without a shred of evidence to support the outrageous accusation—that DCC had "conspired" with NHTSA to weaken federal regulatory requirements. DCC properly raised this argument in its post-trial brief (*see* 18 R. 3988-95), in the Court of

Appeals (*see* Ct. App. Br. 33-36; Reply Br. 17-18), and again in this Court. *See* DCC Op. Br. 30-32; Reply Br. 16-20. The Court of Appeals did not reach this issue (because the issue was pretermitted by that court's reversal of the punitive award on sufficiency-of-the-evidence grounds), but this Court's reinstatement of that award means that DCC's arguments are now ripe for adjudication. (This Court did not address this challenge in Section V of its opinion concerning "miscellaneous rulings of the trial court." *See* Maj. Op. 21.)

Under Tennessee law, DCC is entitled to resolution of this issue on the merits. Rule 36(a) of the Tennessee Rules of Appellate Procedure specifically provides that "[t]he Supreme Court . . . *shall* grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires." *Id.* (emphasis added). Furthermore, the advisory commission comments to Rule 13(a) explain that "[t]he propriety of granting relief is governed by Rule 36" and vest this Court with explicit and "plenary" authority to reach issues that were pretermitted by the Court of Appeals. *Id.* Simply put, the Court "shall" grant relief to DCC on issues (such as the challenge to the improper jury arguments) that DCC has preserved below and properly raised in its briefs to this Court.[6]

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[6] Although an appellate court may decline to grant a party's request for relief if that party (1) invited the error or (2) failed to preserve the issue, *see* TENN. R. APP. P. 36(a), TENN. R. APP. P. 13(a), adv. comm. comments, neither exception is applicable here.

Indeed, DCC submits that the Court's attention to this issue is particularly warranted in light of the fact that four members of this Court have *already* found that the trial was marred by the erroneous admission of the 25 post-sale incidents. *See* Maj. Op. 20-21; Koch. Op. 8-9 (error not harmless); Clark Op. 2-3 (error not harmless). The challenged arguments were incredibly inflammatory and improper—there is simply no place in Tennessee courtrooms for the argument that jurors will bear personal responsibility for placing children in morgues unless they return a nine-digit verdict—and Plaintiffs tellingly do not even purport to defend some of these arguments in their briefs. There can be no question but that these improper arguments enhanced the prejudice to DCC and provide an additional basis for ordering a new trial on punitive damages. What's more, the challenged arguments also provide an independent (and plainly preserved) basis for reversal under *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *See also* Part III.B *infra*.

Second, DCC has also argued at every stage of this litigation that it is entitled to a new trial on all issues due to Plaintiffs' repeated, improper references to *additional* "other incidents" beyond the 37 that were admitted into evidence at trial. DCC properly raised this argument in its post-trial brief (*see* 18 R. 3955-61), in the Court of Appeals (*see* Ct. App. Br. 30-33; Reply Br. 16-17), and again in this Court. *See* DCC Op. Br. 50-52; Reply Br. 7-9. (This Court did not address this issue in Section V of the opinion. *See* Maj. Op. 21.)

To be clear, DCC's challenge as to this issue is entirely distinct from its argument that the trial

court abused its discretion and applied the wrong evidentiary standard when admitting Plaintiffs' other-incidents evidence. The point here is that, even if those 37 incidents (or the 12 pre-sale incidents) were properly admitted, Plaintiffs engaged in obvious misconduct and violated multiple court orders by repeatedly suggesting to the jury that it should assume there were *additional* incidents *beyond* those 37 in which children were killed or injured. Multiple courts have deemed such arguments to constitute reversible error. *See, e.g., Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 503-05 (8th Cir. 1993); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1406-09 (10th Cir. 1988); *GMC v. Moseley*, 447 S.E.2d 302, 306-07 (Ga. Ct. App. 1994).

III. REHEARING IS WARRANTED BECAUSE THE COURT'S LEGAL ANALYSIS CONFLICTS WITH PRIOR DECISIONS AND RELIES UPON MATTERS THAT DCC HAS NOT HAD AN OPPORTUNITY TO ADDRESS.

* * *

C. The Court's Finding That DCC Waived Its Third-Party Harm Objection Conflicts With Prior Decisions And Rests On New Legal Propositions That DCC Has Not Had An Opportunity To Address.

DCC argued that it is entitled to a new trial on punitive damages under *Philip Morris*, *see* DCC Op. Br. 28-29, 30-31, but three members of the Court

declined to grant relief on that issue. *See* Maj. Op. 17-18. Although the majority acknowledged that "DCC requested that the jury be instructed that it could not punish DCC for harm suffered by nonparties" and that "the trial court declined to give this instruction," the Court found that DCC had failed to preserve the issue by not raising an instructional-error challenge in its briefs to the Court of Appeals: "Unfortunately, DCC did not question the rejection of its proposed instruction in the Court of Appeals. . . . Litigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court." *Id.* The Court characterized *Philip Morris* as a case holding that "[u]pon motion by the parties, trial courts are required to *instruct the jury* that it . . . should not directly punish defendants for harm to nonparties." *See id.* at 18 n.9 (emphasis added).

This reasoning is subject to rehearing because it conflicts with other decisions and because DCC has not had an opportunity to address it. First, the Court's characterization of *Philip Morris* as a case solely concerned with jury instructions is too narrow. That case holds that when "the sort of evidence" presented at trial and "the kinds of arguments the plaintiff made to the jury" create a risk of punishment for third-party harm, the trial court "must protect against that risk" upon request by the defendant. 127 S.Ct. at 1060, 1065. Although jury instructions are certainly one type of protection that trial courts can provide, they are not the *only* type of protection. Indeed, *Philip Morris* itself explains that "the States have some flexibility to determine what *kind* of procedures they will implement" and thus "federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at

1065 (emphasis in original). Here, DCC's requests at trial for protection from third-party punishment were not limited to requests for jury instructions—DCC also repeatedly asked the trial court to impose limitations on Plaintiffs' other-incidents *evidence* and to limit Plaintiffs' prejudicial *arguments* about third-party harm and future deaths. Furthermore, it is undisputed that DCC raised these evidentiary and argument challenges in its briefs to the Court of Appeals and to this Court (thus obviating any claim of waiver). This was sufficient to require a new trial on punitive damages under *Philip Morris*. *Holdgrafer,* 160 Cal. App. 4th at 933-34 (ordering new trial on punitive damages, even though defendant did even not request third-party harm instruction at trial, due to admission of *evidence* that posed risk of punishment for such harm).

Second, even if DCC's complaint under *Philip Morris* were viewed solely as a complaint about the jury instructions (and it is not), the Court's finding that DCC failed to preserve that challenge is contrary to Tennessee law. Tennessee's preservation rules are rooted in concerns of judicial economy. As the advisory commission comments to Rule 13(a) explain, it is "[o]rdinarily" the rule that "the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court *because, as stated in Rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue.*" *Id.* (emphasis added). Here, however, it cannot be said that DCC "failed to take action . . . to nullify the error," for the simple reason that the Court of Appeals would not have reached the instructional-error issue even if DCC had raised that issue in its briefs to that court. Because the Court of Appeals

reversed the punitive award for insufficient evidence, any complaint of instructional error would have been pretermitted. Therefore, because DCC (1) raised the instructional-error issue at trial and in its post-trial brief, and then (2) raised the issue before the only appellate court to reach the issue, the Court should find the issue preserved under Rules 3(e), 13(a), and 36. Even if it is "ordinarily" the case that the Court will not consider an issue that was not directly presented to the Court of Appeals, the factual and procedural circumstances demonstrate that that "ordinar[y]" rule is not applicable here.[7]

* * *

DATED: August 4, 2008
Respectfully submitted,

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[7] The cases cited in the Court's opinion are not to the contrary, as both involved situations where an appellant *lost* before the Court of Appeals and then sought to raise a new argument (which the Court of Appeals would have reached and resolved had the issue been presented) during the Supreme Court proceedings. *See Brown v. Crown Equip. Corp.*, 181 S.W.3d 268 (Tenn. 2005); *Va. & Sw. R.R. Co. v. Sutherland*, 197 S.W. 863 (Tenn. 1917).

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APPENDIX F

In the
Supreme Court
of Tennessee

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs and Appellants,

v.

DAIMLERCHRYSLER CORPORATION, Defendant and Appellee, LOUIS A. STOCKELL, JR., Defendant.

No. M2005-01768-SC-R11-CV

Davidson Circuit Court No.: 02C-1288

BRIEF OF APPELLEE DAIMLERCHRYSLER CORPORATION

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ORAL ARGUMENT REQUESTED

ARGUMENT

I. DCC IS ENTITLED TO JUDGMENT ON PUNITIVE DAMAGES.

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B. The Punitive Damage Award Also Violates Due Process.

This Court should affirm the Court of Appeals' grant of judgment to DCC on punitive damages, but in the alternative, this Court should vacate the award and grant DCC appropriate relief because the jury's determination of punitive damages was tainted by numerous constitutional errors.

1. Imposing Punitive Damages in This Case Would Deprive DCC of Fair Notice and Render Tennessee Law Unconstitutionally Vague.

To permit DCC to be punished despite objective indicia of reasonable conduct, such as compliance

with federal safety standards and industry custom, would expand liability for punishment under Tennessee law, thereby depriving DCC of the "fair notice" required by the Constitution. *See State Farm,* 538 U.S. at 417 ("'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'") (quoting *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574 (1996)); *see also Philip Morris*, 127 S.Ct. at 1062 (emphasizing fair notice principles); *Bouie* v. *City of Columbia,* 378 U.S. 347, 353 (1964) (there is a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation"). As the Court put it recently in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 703 (quotation omitted).

Indeed, permitting a defendant to be punished for designing a product in full compliance with on-point federal safety standards and industry custom, and where reasonable people could disagree as to the design's lawfulness, would render Tennessee's punitive damage law unconstitutionally vague as applied to the facts of this case. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (due process requires "the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"); *United States v. Powell*, 423 U.S. 87, 93 (1975). Such a purely subjective approach would not only conflict with the clear language of *Hodges* and the Tennessee

statutes identifying compliance with government standards and industry custom as relevant to the defect inquiry, but would depart from the traditional common-law rule that objectively reasonable conduct is not "reckless" and therefore is not punishable. *Safeco*, 127 S.Ct. at 2215; *see also Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) (civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" and even assuming that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"). Eliminating this traditional common-law protection against arbitrary punishments would violate due process. *See, e.g., Oberg*, 512 U.S. at 430 (overturning Oregon system that departed from common-law punitive damage practice).

2. Contrary to *Philip Morris v. Williams*, the Trial Court Allowed the Jury to Punish DCC for Alleged Harms to Non-Parties.

In its recent decision in *Philip Morris*, the U.S. Supreme Court vacated a $79.5 million punitive damage award because the plaintiff's attorney had asked the jury to consider the number of other consumers harmed by the defendant's conduct and to impose punishment based on such harm to non-parties. 127 S.Ct. at 1061 ("the plaintiff's attorney had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been'"). The Court rejected this tactic as unconstitutional, explaining that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation" and would pose enormous "risks

of unfairness" as well as "risks of arbitrariness" and "concern[s] for adequate notice." *Id.* at 1063-64.

The *Philip Morris* Court further noted that, at trial, the defendant had proposed a jury instruction that would have forbidden the jury from imposing punishment based on harm to non-parties. The Court held that the trial court's rejection of this instruction required reversal of the punitive damage award. *See id.* at 1065 (holding that "a court, upon request, must protect against that risk," and that the resulting error "may lead to the need for a new trial").

Philip Morris compels reversal here, too. At trial, DCC proposed a "third party harm" jury instruction similar to the instruction proposed but rejected by the lower courts in *Philip Morris*. *See* 15 R. 3615 (DCC's proposed instruction No. 22: "you may consider only the harm to the plaintiff in this case" and "if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiff in this lawsuit"); 17 R. 3801. However, the trial court refused to give this instruction during either phase of trial. 11/17 Tr. 208; 11/23 Tr. 25.[15]

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[15] At the charge conference, Plaintiffs urged the court not to give this and other instructions proposed by DCC because they were "simply . . . strategic so if down the road they will have preserved their constitutional claims and their arguments on those issues." 11/17 Tr. 207.

In addition, during summation, Plaintiffs' counsel made the same type of arguments that the Supreme Court condemned in *Philip Morris*. Plaintiffs repeatedly invited the jury—over DCC's objection—to punish DCC for its conduct toward, and the harm suffered by, third parties not before the Court. Among other things, counsel ticked off the *names* of other purported third-party victims; claimed that DCC should be punished for the "other people" who were "dead . . . and injured"; and argued that only by "drop[ping] the hammer" on DCC could the jury prevent more deaths.[16] Counsel even exhorted the jury to calculate its $98 million punitive award by assessing a $14 penalty (based on the cost

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[16] *See, e.g.*, 11/18 Tr. 130-32 (claiming the "issue in this case [is] the weak seat backs that have killed and injured a lot of people," and that "Joshua Flax is not a statistic. Nor is Christopher Buss or Jasmine Chism or Connor Corrigan or Evan Bridge or Emily Neal or Morgan Dize or Leatu Collins or any of the others on that list of OSIs you've heard about or any of the adults"); 11/23 Tr. 209-11 ("You have a chance . . . to get done what DaimlerChrysler Corporation has refused to even try to do. [Objection overruled]. And that is to keep children out of the hospitals and out of the morgues. We ask that you drop the hammer on them and that you render a verdict that is not just likely and not just hopefully enough to stop it, but beyond a shadow of a doubt is enough to stop it."). *See also* 11/18 Tr. 132-33 ("[W]hat this case is about" is that "if they had fixed it . . . none of these other people would be dead and none of these other people would be injured"); *id.* at 148-49 ("The reason to impose punitive damages" is so DCC "doesn't injure or kill people in Tennessee"), *id.* at 150-51 ("the sad truth is that the only way to stop this kind of conduct is punitive. . . . People and children continue to be killed and will continue to be killed."); 11/23 Tr. 192-3 ("sympathy is not going to stop the killing and injuring of innocent people").

of replacing NS seats with RS seats) for each of the seven million minivans that DCC sold to third parties in other transactions. 11/23 Tr. 203-05.

Thus, even more so than in *Philip Morris*, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury" created "an unreasonable and unnecessary risk" that the jury acted at least "in part" out of a "desire to punish [DCC] for harming persons who are not before the court." 127 S.Ct. at 1060, 1065. *See also id.* at 1065 ("How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others?"). Accordingly, the punishment here must be vacated.

3. The Punitive Damage Award Was Further Tainted by Additional Baseless, Irrelevant and Inflammatory Evidence and Arguments.

Plaintiffs did not merely invite the jury to punish DCC for harm to non-parties, in violation of *Philip Morris*. Counsel also made a number of other improper and inflammatory arguments at trial. These tactics induced the jury to act with bias, passion, and prejudice, rather than carefully evaluate DCC's conduct, and encouraged the jury to impose punishment based on other impermissible and unconstitutional factors.

Punishment For Litigation Strategy: Counsel argued, over DCC's objection, *see* 11/23 Tr. 33; 18 R. 3988-91, that the jury should punish DCC for its litigation strategy—including its decision not to call any DCC executives to testify. *See* 11/18 Tr. 92 ("Not a single executive of the DaimlerChrysler Corporation has come before you to explain their

conduct . . . . Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages.").[17] Such argument is improper because a defendant cannot be punished for its litigation strategy or in-court tactics, neither of which has any bearing on "the acts upon which liability was premised." *State Farm*, 538 U.S. at 422-24.[18]

Jurors' Personal Responsibility For Future Deaths: Counsel also repeatedly told the jurors, over DCC's objection, *see, e.g.*, 11/23 Tr. 210; 18 Tr. 3991-92, that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. *See* 11/23 Tr. 210 ("You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the

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[17] *See also* 11/18 Tr. 55-56 ("[I]f you're not willing to bring any of your own employees to court to defend the product, that sort of says it all."); 11/18 Tr. 92 ("Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation."); 11/18 Tr. 66 ("There is nobody here from DaimlerChrysler to even hear your verdict except lawyers."); 11/23 Tr. 191; 11/23 Tr. 192, 11/23 Tr. 209.

[18] Many courts have explicitly held that "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). *See also Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002); *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998).

morgues."); 11/18 Tr. 66 ("[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then.").[19] This was plainly improper and inflammatory argument. *See Philip Morris*, 127 S.Ct. 1057; *cf. Illinois v. Holman*, 469 N.E.2d 119, 133-35 (Ill. 1984) (improper to invoke "virtually . . . guarantee[d]" deaths of "future innocent victims" because such remarks "ha[ve] no function other than to appeal to the passions and fears of the jury"); *Sherman v. Nevada*, 965 P.2d 903, 914-15 (Nev. 1998) ("improper" to "ask[] the jury to . . . align themselves

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[19] *See also* 11/18 Tr. 65 ("[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured."); 11/23 Tr. 210 ("When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?"); 11/18 Tr. 66 ("The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it."); 11/23 Tr. 195 ("[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt."); 11/18 Tr. 66 ("[Y]ou can't stop all the deaths and injuries on the roadways. That's true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you."); 11/18 Tr. 85 ("Going after Stockell is not going to solve anything. It is not going to stop killing and injuring.").

with future innocent victims" because such "rhetorical excess" is "extremely inflammatory").

Alleged NHTSA Conspiracy: Finally, and again over DCC's objection, *see* 11/17 Tr. 241-42, 248; 18 R. 3992-95, counsel told the jurors that "NHTSA belongs to the automakers." 11/16 Tr. 89; 11/17 Tr. 25; 11/18 Tr. 79, 135-36, 143-44. Counsel also told the jurors, again and again, that a massive punitive damage award was necessary because "NHTSA is not going to do anything." *See, e.g.*, 11/18 Tr. 89.[20] Such argument violates *State Farm*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), because it invites the jury to act as a national regulator and attacks the integrity of the federal safety agency.

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[20] *See also* 11/18 Tr. 79 ("NHTSA has closed the investigation and said we're not going to do anything. What does that mean to you and to this case? It is up to you. Nobody else is going to do anything."); 11/23 Tr. 183 ("[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you."); 11/18 Tr. 134-35 ("[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly is not [NHTSA]."); 11/18 Tr. 78 ("The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else."); 11/23 Tr. 39 ("It is undisputed in this case that no safety agency is going to do anything about [the alleged defect].")

5. The Punitive Damage Award is Unconstitutionally Excessive.

At a minimum, this Court must enter a substantial remittitur of the punitive damage award under the "exacting" *de novo* review standard mandated by *State Farm*. The award is excessive as a matter of federal constitutional law, as well as under Tennessee standards. The Sixth Circuit's decisions in *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006), which applied *State Farm* to reduce a punitive damage award against Chrysler to achieve a 2-to-1 ratio, and *Chicago Title Ins. Corp. v. Magnuson*, 2007 U.S. App. LEXIS 11883, *41 (6th Cir. May 21, 2007), which reversed a $32 million punitive award in its entirety because "the fact that First American acted maliciously is insufficient to support a finding that First American's behavior was sufficiently reprehensible for an award of punitive damages," further demonstrate the award in this case must be remitted or vacated.

* * *

Ratio. *State Farm* establishes that the ratio of punitive to compensatory damages in this case—still 8-to-1 after the trial court's remittitur, and over 5-to-1 even if the NIED damages are included—is unconstitutional. *State Farm* holds that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U. S. at 425 (emphasis added).

Because the compensatory award in this case was undeniably "substantial"—and indeed far higher than the $1 million compensatory award in *State Farm*—a 1-to-1 ratio is thus the maximum the Constitution permits. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (although defendant's conduct was "highly reprehensible," a 1-to-1 ratio is the constitutional maximum where compensatory damages are $4,025,000); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (reducing $6 million punitive award to $600,000 to achieve 1-to-1 ratio); *Bach v. First Union Nat'l Bank*, 486 F.3d 150 (6th Cir. 2007) (reducing $2.6 million punitive award to $400,000 to achieve 1-to-1 ratio); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1 (2007) (reducing $26 million punitive award to $6.5 million to achieve 1-to-1 ratio). *See also Clark*, 436 F.2d at 606-07 (where compensatory damages were $235,629, a 2-to-1 ratio is the constitutional maximum).[23]

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[23] Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages "likely were based on a component which was duplicated in the punitive award," such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded $1,250,000 million for NIED—and then an additional $6,632,655 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was based on Joshua Flax's pain and suffering rather than on lost wages.

Comparable Penalties. *State Farm* also requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards "'imposed in comparable cases.'" 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). Even after the trial court's remittitur, the $20 million award in this case is larger than *the combined total* of *all* prior punitive damage awards that have survived appeal in reported cases in Tennessee state courts.[24] The award is 10 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keritsis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming $2 million award).

Similarly, the relevant civil sanctions are dwarfed by the $20 million penalty. *State Farm*, 538 U.S. at 428 (looking to "[t]he most relevant civil sanction under . . . state law for the wrong done"). At the time of the Caravan's design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for an entire fleet of defective vehicles. 49 U.S.C. § 30165(a) (1998).

Indeed, imposing $20 million in punishment would raise the very federalism concerns identified in *Philip Morris*. Such a sum is "sufficiently large" that "it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."

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[24] Post-trial, DCC submitted a chart summarizing all prior punitive damage awards upheld in Tennessee, the accuracy of which Plaintiffs did not challenge. 18 R. 4021-30.

127 S.Ct. at 1062 (citations omitted). If the punitive award were replicated in the 49 other States, the aggregate punishment would total $1 *billion*—far in excess of what anyone could reasonably consider a rational or appropriate national punishment.

* * *

DATED: July 18, 2007
Respectfully submitted,

/s/

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APPENDIX G

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE MIDDLE SECTION AT NASHVILLE

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs and Appellees,

v.

DAIMLERCHRYSLER CORPORATION, Defendant and Appellant, LOUIS A. STOCKELL, JR., Defendant.

Appeal No.: M2005-01768-COA-R3-CV

Davidson Circuit Court No.: 02C-1288

BRIEF OF APPELLANT DAIMLERCHRYSLER CORPORATION

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ORAL ARGUMENT REQUESTED

* * *

III. IN THE ALTERNATIVE, THIS COURT SHOULD ORDER A NEW TRIAL.

A. The Trial Court's Evidentiary Errors, Combined With Plaintiffs' Counsel's Misconduct, Prevented The Jury From Making An Objective Assessment Of DCC's Design Choice.

* * *

2. The irrelevant evidence and improper argument concerning "other incidents."

DCC was further prejudiced by the admission of irrelevant evidence concerning 37 "other incidents"

involving DCC vehicles. Many of these incidents did not take place under "substantially similar" conditions as the accident in this case, and most occurred *after* May 1998, when the Sparkmans purchased their minivan. To make matters worse, Plaintiffs' counsel inflamed the jury by suggesting, on multiple occasions, that DCC had suppressed evidence of *additional* "other incidents"—on top of the 37 already admitted by the trial court—in which children were injured or killed.

Factually Dissimilar Incidents: In a product liability case, evidence of other accidents supposedly resulting from the same alleged defect —also referred to as other similar incidents ("OSIs")—can be inflammatory and highly prejudicial. *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995). Consequently, Tennessee, like many other States, places strict limits on the admissibility of such evidence by requiring a threshold showing of substantial similarity. *See, e.g., Stroming v. Houston's Restaurant, Inc.*, 1994 WL 658542, at *1-3 (Tenn. Ct. App. Nov. 23, 1994); *Barrett v. Raymond Corp.*, 1991 WL 4996, at *1 (Tenn. Ct. App. Jan. 24, 1991); *John Gerber Co. v. Smith*, 263 S.W.2d 974, 977 (Tenn. 1924) (other accidents must have "occurred under substantially similar conditions" to be admissible).

In this case, the trial court held a pre-trial hearing at which it deemed 37 other accidents "substantially similar" to the Flax accident, and Plaintiffs proceeded to introduce evidence of them and base arguments on them. *E.g.*, 11/8 Tr. 203. But few, if any, of these incidents satisfied the foundational requirements for admissibility, even

when evaluated under the trial court's own "substantial similarity" standard:

> [A] substantial similarity in this case would be [1] a rear-end collision [2] between two moving vehicles [3] with catastrophic injuries. . . . As far as the force is concerned, it would have to be [4] reasonably near the Delta V forces that happened in this case.

10/25 Tr. 232-33. For example, in five of the 37 OSIs, the occupant's injury was not caused by a rear-impact collision.[12] More than two-thirds of the 37

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[12] In one OSI, the injuries were caused by a fire resulting from a ruptured fuel tank. PX830; 11/1 Tr. 114 (Butler). In two of the OSIs, the injuries were sustained during rollover accidents. PX790, 11/1 Tr. 63-65 (Amberson); PX808 11/1 Tr. 95-98 (Bennett). And in two more, the injuries were caused by front-impact collisions. PX795, 11/1 Tr. 67-70 (Baird); PX800, 11/1 Tr. 78-82 (Basa).

OSIs[13] involved a vehicle that was "sitting still" or "completely stopped" at the time of the accident.[14] Many of the OSIs involved only minor injuries: one involved a broken nose, Plaintiffs' Exhibit ("PX") 1250, 11/1 Tr. 211-12, and another a "cervical and LS strain" that Plaintiffs' expert conceded "doesn't sound serious." 11/8 Tr. 226; *see also* PX887, 11/1 Tr. 145-48.[15] And Plaintiffs simply failed to provide evidence showing that most of the OSIs occurred at a Delta-V similar to the Delta-V in this case.[16]

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[13] *See* PX795 (Baird); PX796 (Bajalia); PX1237 (Berthelsen); PX666 (Bridwell); PX830 (Butler); PX849 (Cirka); PX1225 (Collins); PX730 (Dize); PX1246 (Jones); PX250 (Labelle); PX976 (McCloskey); PX977 (McCurdy); PX1252 (McMillan); PX985 (Middleton); PX1027 (Prestridge); PX774 (Rich); PX1039 (Robinson); PX1050 (Saucenda); PX1067 (Spires); PX1069 (Stanley); PX1081 (Toothaker); 10/27 Tr. 65 (Corrigan); 10/27 Tr. 86 (Comella); 10/27 Tr. 104 (Neal); 10/27 Tr. 123 (Chism).

[14] Courts have suggested that "even a lay person can understand that" a collision between two moving vehicles is "not at all substantially similar to" a collision between a moving vehicle and a stationary vehicle. *See J.B. Hunt Transport, Inc. v. Gen. Motors Corp.*, 52 F. Supp. 2d 1084, 1089 (E.D. Mo. 1999).

[15] *See also* PX790, 11/1 Tr. 63-65 (Amberson); PX979; 11/1 Tr. 171-73 (McNeely); PX985, 11/1 Tr. 173-74 (Middleton); PX830, 11/1 Tr. 114 (Butler); PX1243, 11/1 Tr. 210 (Hanifee); PX849, 11/1 Tr. 127-29 (Cirka); PX800, 11/1 Tr. 78-82 (Basa); PX808, 11/1 Tr. 95-98 (Bennett); PX771-72, 11/1 Tr. 56-57 (Persak); PX666; 10/27 Tr. 52-56 (Bridwell); PX922, 11/1 Tr. 158-60 (Henkel); PX1027, 11/1 Tr. 181-82 (Prestridge); PX1050, 11/1 Tr. 185-86 (Saucenda), PX1069, 11/1 Tr. 188-90 (Stanley).

[16] In five instances, Plaintiffs failed to demonstrate the speed at which *either* vehicle was traveling at the time of the accident. *See* PX827 (Buss); PX1243 (Hanifee); PX944 (Kinsey); PX973

[Footnote continued on next page]

This gravely prejudiced DCC. Indeed, even if *most* of the 37 OSIs were properly admitted, the erroneous admission of just a few would still warrant reversal.[17]

[Footnote continued from previous page]
(Martin); PX771-72 (Persak). In 15 other instances, DCC merely had notice that a stationary vehicle had been struck by a vehicle traveling at an unknown speed. *See* PX796 (Bajalia); PX830 (Butler); PX849 (Cirka); PX1225 (Collins); PX729-32 (Dize); PX1246 (Jones); PX1250 (Labelle); PX976 (McCloskey); PX1252 (McMillan); PX979 (McNeely); PX1039 (Robinson); PX1050 (Saucenda); PX1067 (Spires); PX1069 (Stanley); PX1081 (Toothaker). Two more OSIs involved a collision between a nearly-stationary vehicle and a vehicle traveling at an unknown speed. *See* PX800 (Basa); PX922 (Henkel). And even when Plaintiffs *did* provide Delta-V information, most of the OSIs were not substantially similar given the speeds and nature of the vehicles involved. For example, eight of the OSIs involved one stationary vehicle and one vehicle traveling at an excessive speed, often more than 50 or 60 miles per hour. *See* PX795 (Baird); PX1237(Berthelsen); PX666 (Bridwell); PX776-78 (Chism); PX977 (McCurdy); PX985 (Middleton); PX1027 (Prestridge); PX774 (Rich). And in four of the OSIs, the vehicle that caused the rear impact was a heavy, dissimilar vehicle such as a tractor-trailer, bus, or "motor home towing another vehicle." *See* PX887 (Fortney); PX756 (Neal); 10/27 Tr. 86 (Comella); PX997 (Munoz).

[17] DCC repeatedly and timely objected to the admission of the OSI evidence. *See, e.g.*, 10/27 Tr. 19 (COURT: "[I]s there an objection on all of them?" DCC: "Yes, Your Honor."); 11/1 Tr. 47-48 ("renewing" DCC's "general objection" to Plaintiffs' admitted OSI evidence); 11/8 Tr. 203 (objection to Saczalski's claim that 37 incidents were substantially similar); 11/9 Tr. 83 ("As your Honor knows, we object to . . . even the 37 OSIs that have come in and we've cross-examined on them. We understand the Court has submitted them, but we want the record to be clear that we object . . . ."). *See also* 17 R. 3949, 18 R. 3950-55 (post-trial motion).

See General Motors Corp. v. Lupica, 379 S.E.2d 311, 314-15 (Va. 1989) (reversing plaintiff's product liability verdict, even though "most" of the plaintiff's OSI evidence met "the 'substantial similarity' test," due to the "possibility of prejudice" resulting from the handful of improperly-admitted OSIs). Because "it [is] reversible error to admit [OSIs] in a products liability case without a 'showing of similarity,'" *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 23-24 (Ga. 2001), the verdict cannot stand. *See also Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 140-43 (Tex. 2004) (vacating jury verdict in defect case because trial court admitted evidence of dissimilar car accidents).

Post-Sale Incidents: 25 of the alleged OSIs occurred after the Sparkmans purchased their Caravan—and some even occurred after the *accident* in this case. The timing of these OSIs is critical because, as Plaintiffs repeatedly confirmed throughout the trial and as the jury was instructed, Plaintiffs' OSI evidence was offered for the "strictly limited" purpose of showing that DCC had "notice" of the alleged defect.[18] A post-sale OSI cannot establish

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[18] *See, e.g.*, 10/25 Tr. 228 ("The OSIs are offered to prove the magnitude of the danger known to Chrysler."); 11/9 Tr. 32 ("It goes to their notice."); 11/15 Tr. 88 (arguing that police reports used as OSI evidence "are not offered to prove the truth of what's contained therein . . . [but] are offered to prove notice"); 11/23 Tr. 183 ("With respect to OSI, I'll say it again. The purpose of other similar incidents . . . is to prove that DaimlerChrysler was on notice. We can't offer them up unless it proves notice."). Plaintiffs again confirmed this position in their post-trial briefing. 32 R. 6506 ("These other similar incidents . . . were tendered and were admissible only to prove notice and knowledge of defect and danger."). *See also* 11/18 Tr.

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such "notice" for the obvious reason that it occurred *after* the alleged tort was committed. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1248 (10th Cir. 2000) (reversing verdict because other accidents "were incorrectly admitted to show notice, as they occurred after the incident at issue here").[19]

Accordingly, the 25 OSIs that occurred *after* the Sparkmans' Caravan was purchased in May 1998 are not relevant to any issue in this case, and should have been excluded. *See* Tenn. Code. Ann. § 29-28-105(a) (providing that a manufacturer may only be held liable for a product that is defective or unreasonably dangerous "at the time it left the control of the manufacturer or seller."); Tenn. Code. Ann. § 29-28-105(b) ("[T]he state of scientific or technical knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable."). In fact, this Court in *Irion v. Sun Lighting, Inc.*, expressly recognized "Tennessee's statutory prohibition on using post-sale developments to prove that a product was unreasonably dangerous when it was sold." 2004 WL 746823, at *13 (Tenn. Ct. App. Apr. 7, 2004).

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38 (jury instruction that OSI evidence could be considered for the "strictly limited" purpose of showing that DCC had "knowledge or notice of the alleged defect").

[19] DCC objected to the admission of post-sale OSIs at trial and in its post-trial motion. 11/1 Tr. 107 ("continuing objection" to "the incidents that come after Flax"); 18 R. 3953-55 (post-trial motion).

Admission of these OSIs violated *Irion* and Tennessee's product liability statute.[20]

The admission of six OSIs that occurred after the Flax *accident* cannot be justified under *any* theory. In *Irion*, this Court held such post-accident evidence irrelevant, stating that "we fail to see how the August 1997 . . . efforts . . . [are] at all relevant to the fire that happened in February 1997." 2004 WL 746823, at *9 n.9. *See also Smith*, 214 F.3d at 1248.[21]

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[20] In its post-trial order, the trial court stated that these post-sale OSIs were properly admitted (1) because post-sale evidence is admissible "on the issue of feasibility" and (2) because "Tennessee law allows other similar incidents to be admitted into evidence that occurred both before and after the incident took place." App. 49, 40 R. 7815. Neither explanation is persuasive. First, post-sale evidence may be admitted to show feasibility only "if that issue were controverted by the defendants," *Irion*, 2004 WL 746823, at *14 n.14—which was not the case here. Second, although post-sale OSIs may be admissible in Tennessee in some circumstances to prove *dangerousness* or *defect*, they are not admissible when, as here, they are offered for the "strictly limited" purpose of proving notice.

[21] Nor were the OSIs the only form of evidence that the trial court improperly admitted to prove "notice." Over DCC's repeated objection, *see* 10/25 Tr. 187, 11/9 Tr. 110-11, 11/10 Tr. 47-49, 18 R. 3965-66 (post-trial motion), the trial court admitted evidence concerning two episodes of the television program "60 Minutes," based on Plaintiffs' claim that these episodes gave "notice" to DCC of a problem that DCC failed to fix. 11/3 Tr. 51-55, 11/9 Tr. 55-57, 112, 11/10 Tr. 34-35, 46-49. Yet the first episode—which aired in the early 1990s—did not mention, let alone criticize, the seat used by Chrysler. *See Gardner v. Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996) ("[T]he 60 Minutes feature . . . involved Chrysler's competitors' vehicles

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Counsel's Suggestion that DCC Suppressed Additional Incidents: Prior to trial, DCC asked the trial court to make a definitive ruling on the precise number of admissible OSIs because DCC suspected that Plaintiffs would "try[] to create the inference there are others" and suggest to the jury that "there were other ones out there we prevented [Plaintiffs] from getting in." 11/1 Tr. 40-41. Plaintiffs wasted no time in confirming DCC's suspicions. In their opening statement, after emphasizing the importance of OSIs, Plaintiffs told the jury that although "[y]ou're going to hear about a bunch of them . . . . [t]here is no way to know for sure how many times Chrysler or DaimlerChrysler seat backs have collapsed in wrecks." 11/3 Tr. 46-48. And again, on three separate occasions during the direct examination of Saczalski, Plaintiffs asked suggestive questions that implied the existence of more than 37 OSIs. *See* 11/9 Tr. 76-77 ("[D]o you know for a fact that only three children have been killed by these collapsing seats?"); 11/9 Tr. 77 ("Do you know for a fact that DaimlerChrysler has really produced all of the information for all of the incidents that it has?"); 11/9 Tr. 77-78 ("Do you know for a fact that there were only 40 other incidents where people were killed or injured by these collapsing minivan seats in circumstances similar to this?").

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but no Chrysler minivan products."). And the second episode did not air until the late 1990s or early 2000s—that is, *after* the sale of the Sparkmans' minivan. 11/9 Tr. 110-12. Accordingly, both episodes should have been excluded.

After DCC's third objection, *see* 11/9 Tr. 76-81, the trial court denied DCC's motion for mistrial but issued an order "direct[ing] you [*i.e.*, Plaintiffs' counsel] not to ask any more questions about it." 11/9 Tr. 82. Yet Plaintiffs ignored this and other orders,[22] stating during the Phase I closing argument that "the weak seat backs . . . have killed and injured a lot of people" and that "*[t]here is no evidence from DaimlerChrysler Corporation that those 37 are the only ones killed and injured.*" 11/18 Tr. 131-32 (emphasis added). DCC immediately moved for a mistrial, which was denied. 11/18 Tr. 132. Plaintiffs then continued with their improper argument, telling the jury: "*It is a lie. There is no evidence that there have only been three deaths.*" 11/18 Tr. 132 (emphasis added).

As Phase II began, Plaintiffs picked up exactly where they left off. Counsel asserted in opening statement that "[t]here is no evidence . . . that [DCC] has ever made any attempt whatsoever to find out how many adults and children have been killed and injured as a result of these collapsing seat backs." 11/23 Tr. 40. DCC objected, and the Court ordered Plaintiffs to "[g]o on to something else." 11/23 Tr. 40. But Plaintiffs again refused to comply, instead cross-examining a DCC witness by asking: "So you, as you sit here today, have really no idea how many

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[22] At DCC's request, *see* 15 R. 3462-65, the trial court issued another order requiring that "[a]ny questions related to OSIs over and above the 37 that the Court has already admitted as substantially similar, you'll have to approach the bench before you ask it." 11/15 Tr. 12. DCC also raised this issue in its post-trial motion. 18 R. 3955-61.

incidents of occupant-to-occupant contact or fatal-to-severe injuries from collapsing seats in Chrysler minivans . . . are contained within Chrysler's own files." 11/23 Tr. 158. Finally, during the Phase II closing argument, Plaintiffs yet again suggested to the jury that there were far more than 37 OSIs, asserting that "[w]ith respect to OSI, . . . [t]he only ones we can . . . use are ones that DaimlerChrysler knew about." 11/23 Tr. 183.

The prejudice resulting from Plaintiffs' misconduct was undeniably severe. It not only left the jury with the false but immensely harmful impression that DCC's seat had caused numerous deaths and injuries, but also suggested that DCC had suppressed evidence that would have revealed the magnitude of the alleged safety hazard. Plaintiffs' misconduct inflamed the jury and infected the trial from start to finish, forcing DCC to alter its trial strategy in an attempt to remedy the improper allegations.[23]

Courts regularly grant new trials in product liability actions where a plaintiff makes improper references to other incidents that have not been proved substantially similar—even under

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[23] For example, in response to Plaintiffs' arguments, DCC was forced to draw further attention to the OSI issue during its Phase II opening statement. *See, e.g.*, 11/23 Tr. 52-54 ("The Court instructed you during the trial . . . that there are 37 substantially similar incidents, incidents for your consideration. It didn't come from me, it didn't come from Chrysler, and it didn't come from them. That came from Judge Gayden. So any type of inference that there were more of those was done to misdirect you and try to make you lose your way.").

circumstances far less egregious than presented in this case, where counsel flagrantly defied order after order from the trial court. *See, e.g., Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 503-05 (8th Cir. 1993) (reversing $9 million verdict because the trial judge deemed *four* OSIs admissible, yet plaintiffs' counsel asked a defense expert "whether he was familiar with the other *nine* incidents" and then asserted during closing argument that "[w]e don't know how many other injuries there are"); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1406-09 (10th Cir. 1988) (reversing $3.1 million verdict because the trial judge deemed *five* OSIs admissible, yet plaintiffs' counsel suggested during cross-examination of a defense witness that there had been *twenty-four* OSIs); *Barker v. Deere & Co.*, 60 F.3d 158, 165 (3d Cir. 1995) (reversing product liability verdict because the plaintiff's "opening and closing statement contained references to . . . other accidents which were not similar to the incident in which [the plaintiff] was injured"); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 616 (Iowa 2000) (reversing $21.3 million verdict because plaintiffs referred to OSIs despite "fail[ing] in their burden of proving that all the consumer complaints . . . are substantially similar to the facts and circumstances of the Mercer fire").

This case is strikingly similar to *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994), a design defect case where the court reversed a $105 million verdict because plaintiffs' counsel—the Butler, Wooten law firm—did exactly what it did here: make numerous improper references to other incidents that had not been shown to be substantially similar. Prior to trial, the *Moseley* court had directed that "there would have to be a showing of substantial similarity, outside the

presence of the jury, before any other case was mentioned." *Id.* at 307. Despite this order, the Butler, Wooten attorneys "repeatedly referred to 120 other lawsuits (and occasionally an estimated 240 deaths) during opening statement, examination and cross-examination of witnesses, and closing argument . . . . without ever attempting to make the required showing of similarity." *Id.* at 306. The court held that "Plaintiffs' counsel's repeated breach of [the OSI] ruling can only be regarded as deliberate, and considering the inflammatory nature of the references to a multitude of other lawsuits and deaths, we are unable to say as a matter of law that the frequent violation of the trial court's ruling did not influence the jury's verdict." *Id.* at 307.

3. The pervasive misconduct and discovery abuse by Plaintiffs' counsel.

The suggestion that DCC "suppressed" OSIs was only one of many improper and inflammatory arguments made by Plaintiffs' counsel during trial. As shown below, these tactics induced the jury to act with bias, passion, and prejudice rather than carefully evaluating DCC's design choice.[24] Finally, Plaintiffs' false statements and concealment of critical crash-test evidence concerning the "dual

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[24] *See, e.g., Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) ("no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added); *Guess v. Maury*, 726 S.W.2d 906, 913-18 (Tenn. Ct. App. 1986) (surveying cases reversed because of counsel's misconduct, and ordering new trial based, in part, on the "inflammatory and prejudicial" closing argument).

recliner" seat design—which did not come to light until months after the jury rendered its verdict—provided the capstone to a trial that was riddled with error from start to finish.

"Send A Message" Arguments: Over DCC's objection, *see* 11/23 Tr. 32, 18 R. 3986-87, counsel inflamed the jury with explicit "send a message" arguments, urging the jury to "get the word out" to "all Americans," and "wake [DCC] up" through a massive punitive damage award that "hits [DCC] where it hurts."[25] Such claims are improper because they pit local jurors against a large, out-of-state corporation, and invite jurors to impose quasi-criminal punishment based on passion and prejudice. *See, e.g.*, *Pullen v. Textron, Inc.*, 845 S.W.2d 777, 779-80 (Tenn. Ct. App. 1992); *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985).

Punishment For Litigation Strategy: Counsel was also allowed to argue, over DCC's objection, *see*

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[25] *See, e.g.*, 11/18 Tr. 66-67 ("The only thing that will stop it is a verdict that hits them where it hurts."); 11/18 Tr. 92 ("Somebody is going to have to wake them up. Only you can do that."); 11/18 Tr. 149-50 ("get the message to them" through a substantial punitive damage award); 11/18 Tr. 151 ("[t]he sad truth is the only way to stop this kind of conduct is punitive [damages]. . . . This is a story that needs to get out."); 11/23 Tr. 194 ("The warning has got to be communicated to everybody for it to be effective to all Americans who own or might ever ride in or put a child in one of these minivans. Since DaimlerChrysler will not warn anybody, it is up to you."); 11/23 Tr. 210-11 ("We ask that you drop the hammer on them and that you render a verdict that . . . gets the word out.").

11/23 Tr. 33; 18 R. 3988-91, that the jury should punish DCC for its litigation strategy—including its decision not to call any DCC executives to testify. *See, e.g.*, 11/18 Tr. 92 ("Not a single executive of the DaimlerChrysler Corporation has come before you to explain their conduct . . . . Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages.").[26] Such argument is improper because a defendant cannot be punished for its litigation strategy or in-court tactics, neither of which has any bearing on "the acts upon which liability was premised." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003).[27]

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[26] *See also* 11/18 Tr. 55-56 ("If you've got a product out there and somebody says it is defective and killing and hurting people, and if you're not willing to bring any of your own employees to court to defend the product, that sort of says it all."); 11/18 Tr. 92 ("Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation."); 11/18 Tr. 66 ("There is nobody here from DaimlerChrysler to even hear your verdict except lawyers."); 11/23 Tr. 191; 11/23 Tr. 192; 11/23 Tr. 209.

[27] Many courts have held explicitly that "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *See, e.g., De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). *See also Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002); *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998) (reversible error for plaintiff to argue "Shame on the corporation for not sending representatives here to testify about why they don't have a policy," because "[s]uch statements could serve no purpose other than to inflame the passions of the jury to return large

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Jurors' Personal Responsibility For Future Deaths: Counsel repeatedly told the jurors, over DCC's objection, *see, e.g.*, 11/23 Tr. 210; 18 Tr. 3991-92, that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. *See, e.g.*, 11/23 Tr. 210 ("You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the morgues."); 11/18 Tr. 66 ("[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then.").[28]

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awards").

[28] *See also* 11/18 Tr. 65 ("[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured."); 11/23 Tr. 210 ("When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?"); 11/18 Tr. 66 ("The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it."); 11/23 Tr. 192 ("[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt."); 11/18 Tr. 66 ("[Y]ou can't stop all the deaths and injuries on the roadways. That's true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you."); 11/18 Tr. 85 ("Going after Stockell is not

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This was plainly improper argument. *Cf. Illinois v. Holman*, 469 N.E.2d 119, 133-35 (Ill. App. Ct. 1989) (improper to invoke "virtually guaranteed" deaths of "future innocent victims" because "the likely, if not inevitable, effect of such graphic remarks is to focus the jury's attention on extraneous fears and divert it from considering the [facts of] the case," and because such remarks "ha[ve] no function other than to appeal to the passions and fears of the jury").

"NHTSA Conspiracy": Over DCC's objection, *see* 11/17 Tr. 241-42, 248; 18 R. 3992-95, counsel was permitted to tell the jurors that "NHTSA belongs to the automakers." *See, e.g.*, 11/16 Tr. 89; 11/17 Tr. 25; 11/18 Tr. 79, 135-36, 143-44. Counsel also told the jurors, again and again, that a massive punitive damage award was necessary because "NHTSA is not going to do anything." *E.g.*, 11/18 Tr. 89.[29] Such

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going to solve anything. It is not going to stop killing and injuring.").

[29] *See also* 11/18 Tr. 79 ("NHTSA has closed the investigation and said we're not going to do anything. What does that mean to you and to this case? It is up to you. Nobody else is going to do anything."); 11/23 Tr. 183 ("[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you."); 11/18 Tr. 134-35 ("[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly is not the National Highway Traffic Safety Administration."); 11/18 Tr. 78 ("The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else."); 11/23 Tr. 38 ("It is undisputed in this case that no safety agency is going to do anything about [the alleged defect].")

argument violates *State Farm*, 538 U.S. at 420, and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), because it invites the jury to act as a national regulator and displace the judgment of federal safety agencies by projecting Tennessee tort law nationwide. *See also Guess v. Maury*, 726 S.W.2d 906, 916-18 (Tenn. Ct. App. 1986) (vacating jury verdict due to improper allegation of "conspiracy" between defendant and absent third party).

Concealment Of Evidence And False Statements Concerning "Dual Recliners": At the heart of Plaintiffs' case was the notion that DCC acted outrageously because it failed to use dual recliners—which are currently used in the RS minivan—in the Sparkmans' NS minivan. Saczalski testified that dual recliners "would have likely produced a different outcome for Joshua Flax." *See* 11/9 Tr. 87-88. And Plaintiffs' counsel repeatedly argued that "the reason they didn't put [the RS's] dual recliners in the NS minivan was because of cost. . . . In this 1998 minivan, different seats could have been put in that would not have invaded the occupant compartment." *See, e.g.*, 11/23 Tr. 184. Plaintiffs' claim for punitive damages was expressly based on these arguments. *See* 11/23 Tr. 204-05 ("But if it is $14 minimum more cost to put in dual recliner and you start multiplying it by [seven] million[] minivans, that mounts up pretty quickly."). *See also* 33 R. 6610 (Plaintiffs' post-trial brief) ("[DCC] avoided installing a dual recliner that would have doubled the seat strength in the Sparkmans'

minivan because such a move would have entailed adding $7 to the cost of each of the front seats.").[30]

Yet, as Plaintiffs' own testing showed, these claims and statements were false. In 2002, Plaintiffs paid Saczalski to conduct dynamic rear-impact crash tests on the RS's dual recliners. These tests—which were conducted under conditions similar to the accident here—resulted in occupant-to-occupant contact between a front-seat passenger and a child seated in the rear seat. However, even though these tests were paid for by Plaintiffs' counsel, *see* 38 R. 7529, and even though DCC's discovery request encompassed the crash-test results, *see* 38 R. 7516-19, Plaintiffs never produced these test results during discovery.[31] Instead, Plaintiffs only produced those tests that they felt resulted in "favorable" results. 38 R. 7549-52.

This misconduct did not come to light until months after trial, when Saczalski was deposed in another NS minivan seat back case pending in

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[30] Plaintiffs also proffered a different "alternative" seat at trial—known as the "Sebring seat"—but Plaintiffs' expert conceded that, financially, it would have been "a wash" for DCC to install the Sebring seat in the NS minivan. 11/8 Tr. 235. Thus, Plaintiffs' punitive damage claim was based on their argument that DCC should have installed dual recliners in the RS minivan, but chose not to in order to save money.

[31] *See* App. 50-51, 40 R. 7816-17 (trial court's findings that "these tests were conducted under similar conditions," that "the dummy in the RS dual recliner seat made contact with the 3-year-old surrogate dummy," that DCC "made a timely discovery request of the plaintiff for 'any videos, photos, or tests created or obtained by Plaintiff's experts,'" and that "Plaintiffs did not disclose [the] sled tests").

Florida. DCC immediately moved for a new trial, *see* 38 R. 7504-46, and supplied the trial court with a video clip of the long-suppressed crash test that graphically depicted the occupant-to-occupant contact. 40 R. 7773 (index to video). The trial court found that Plaintiffs had "abus[ed] the discovery process" through their concealment and through their misrepresentations and false statements at trial, but refused to order a new trial because it was "of the opinion that discovery of the RS sled tests would not have affected the outcome of the trial." App. 50-51, 40 R. 7816-17. Instead, the court "sanction[ed] the plaintiffs . . . [by] den[ying] any and all discretionary costs." *Id.*

The trial court erred by not imposing a more severe sanction. It was Plaintiffs' misconduct that enabled them to obtain the $101.75 million verdict, as their entire argument for punitive damages would have been exposed as a fraud had they produced the crash-test results or simply refrained from making arguments that their own tests proved to be false. The sanction imposed by the court—the loss of discretionary costs totaling a few thousand dollars—is hardly commensurate with the multi-million dollar verdict that the misconduct helped produce. At a minimum, this episode provides an additional reason for this Court to conclude that, based on the totality of the evidentiary errors and misconduct discussed above, the verdict cannot stand.

B. A New Trial On Punitive Damages Is Required.

Plaintiffs' punitive damage claim should never have been submitted to the jury, and the Court should grant judgment in DCC's favor on this claim. In the alternative, the Court should vacate the

award and order a new trial because the verdict is against the weight of the evidence for the reasons discussed above, and because the jury's determination of punitive damages was tainted by numerous errors that violated DCC's due process rights.

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IV. AT A MINIMUM, THIS COURT SHOULD REMIT THE DAMAGE AWARDS.

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B. The Punitive Damage Award Is Excessive And Unconstitutional.

The Court should also enter a significant remittitur of, or eliminate altogether, the $20 punitive damage award, which is unconstitutionally excessive under the due process standards that govern and limit such awards.[42] In *BMW of N. Am.*,

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[42] DCC requested that the trial court remit the punitive damage award to no more than the size of the compensatory damage award against DCC. 18 R. 3995-4000.

Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court held that the Due Process Clause forbids "grossly excessive" punitive damage awards, and required excessiveness challenges to be evaluated by reference to three "guideposts"—reprehensibility, ratio, and comparable penalties—to determine whether the defendant had "fair notice" of the severity of the punishment that could be imposed. *Id.* at 574-85. In *State Farm*, the Court strengthened the *Gore* guideposts, emphasizing again the Court's deep concerns about the continuing dangers of "grossly excessive" and "arbitrary" punitive damage verdicts, particularly those imposed pursuant to vague standards and procedures. 538 U.S. at 417-18. The Court observed that, although punitive damage awards serve the same purposes as criminal penalties, defendants subjected to punitive damages "have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damage systems are administered." *Id.* at 417. To protect against arbitrary and unconstitutional awards, it is therefore vital that "[t]he principles set forth in *Gore* . . . be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

The Court also emphasized that the constitutionally-mandated *de novo* review of a punitive damage award must be "exacting." 538 U.S. at 418 (brackets omitted); *see also In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001) ("a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards").

* * *

Ratio: *State Farm* establishes that the ratio of punitive to compensatory damages in this case—still over 5:1 after the remittitur—is unconstitutional. The Court squarely held that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U. S. at 425 (emphasis added).

Because the compensatory award in this case was undeniably "substantial"—and indeed far higher than the $1 million compensatory award in *State Farm*—a 1:1 ratio is the maximum the Constitution permits. *Cf. Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (although defendant's conduct was "highly reprehensible," a 1:1 ratio is the constitutional maximum where compensatory damages are $4 million); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (holding that a punitive damage award resulting in a 10-to-1 ratio was constitutionally excessive, and reducing the award by 90% to achieve a 1-to-1 ratio).

Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages "likely were based on a component which was duplicated in the punitive award," such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded $1,250,000 million for negligent infliction of emotional distress against DCC—and then an additional $6,632,655 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was

based on Joshua Flax's pain and suffering rather than on lost wages. *See* Part IV.A *supra*. The duplication inherent in these awards warrants a further reduction.

Comparable Penalties: *State Farm* requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards "'imposed in comparable cases.'" 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). Even after the trial court's remittitur, the $20 million award in this case is larger than *the combined total* of *all* prior punitive damage awards that have survived appeal in reported cases in Tennessee state courts.[43] The award is 10 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keritsis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming $2 million award).[44]

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[43] DCC submitted with its post-trial motion a chart summarizing all prior punitive damage awards upheld in Tennessee, the accuracy of which Plaintiffs did not challenge. App. 23-32, 18 R. 4021-30.

[44] The evidence and argument concerning DCC's "wealth"—which was presented over DCC's objection, *see* 11/17 Tr. 213-16; 11/23 Tr. 10, 42, 57-60, 187; 15 R. 3613 (proposed Phase I jury instruction); 17 R. 3799 (proposed Phase II jury instruction); 18 R. 3981-84 (post-trial motion)—does not provide any basis for departing from the *Gore*/*State Farm* due process guideposts. Indeed, in *State Farm*, the Court expressly noted that a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and simply "provides an open-ended basis for inflating awards when the defendant is wealthy." 538 U.S. at 427-28 (quotation omitted). Moreover, the admission of evidence of the purported wealth of DaimlerChrysler AG—again over DCC's objection, *see* 16 R. 3752, 18 R. 3983—is an additional due process violation.

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The *State Farm* Court also looked to "[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs]," and determined that the relevant sanction—a $10,000 fine for an act of fraud—was "dwarfed by the . . . punitive damages award." 538 U.S. at 428. The Court noted that it "need not dwell long on this guidepost" because it was so clear that the amount of the punishment vastly exceeded any comparable sanction. *Id.* Here too, the relevant sanctions are dwarfed by the punitive damage award. At the time of the Caravan's design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for an entire fleet of defective vehicles. *See* 49 U.S.C. § 30165(a) (1998).

Criminal fines also provide guidance. Under Tennessee law, a corporation generally may be fined no more than $350,000 for commission of a felony. *See* Tenn. Code. Ann. § 40-35-111(c). Here, of course, DCC committed no crime, nor was it charged with a crime, and the Court in *State Farm* stated that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." 538 U.S. 428. Yet the $20 million penalty here is more than 57 times the size of the maximum fine that could have been imposed against DCC had it actually been

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DaimlerChrysler AG is a separate and independent German corporation only indirectly related to DCC. *See* 27 R. 5654-55.

charged, tried, and convicted of a felony in Tennessee and afforded all the protections of a criminal trial.[45]

* * *

DATED: December 5, 2005

Respectfully submitted,

/s/_____
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[45] The punitive damage award is also excessive under the state-law standards established in *Hodges*. As discussed above, many of the *Hodges* factors cut strongly in DCC's favor and require that the award be reduced. Because many of the *Hodges* factors are relevant to the question whether *any* punitive damages may be awarded (as well as to the excessiveness of the award under federal due process standards), they are addressed in the discussion above, and DCC hereby incorporates all of its foregoing arguments.

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APPENDIX H

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs,

v.

DAIMLERCHRYSLER CORPORATION, and LOUIS A. STOCKELL, JR., Defendants.

NO. 02C-1288

DAIMLERCHRYSLER CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

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* * *

IV. AT A MINIMUM, THIS COURT SHOULD ORDER A NEW TRIAL ON PUNITIVE DAMAGES OR ENTER A DRASTIC REMITTITUR.

A. DCC Is Entitled To A New Trial On Punitive Damages.

* * *

4. The Arguments, Evidence And Instructions Concerning Punitive Damages Violated *State Farm*.

The Phase 2 proceeding violated, in numerous ways, the constitutional limitations on punitive damage awards established in *State Farm Mutual*

Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

First, the Court erred by admitting evidence of the "wealth" and financial condition of DaimlerChrysler AG, and by instructing the jury that the punitive damage award "must" be based upon it. *See* 11/17 Tr. 217-19 (overruling DCC's objection), 11/23 Tr. 34 (instruction). In *State Farm*, the Court disapproved the use of wealth as a basis for punitive damage awards, explaining that wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and simply "provides an open-ended basis for inflating awards when the defendant is wealthy." 538 U.S. at 427-28 (quotation omitted). "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." *Id.* at 427 (quotation omitted); *see also BMW v. Gore*, 517 U.S. 559, 585 (1996) (rejecting wealth as a due process factor); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) ("emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations"); American Law Institute, *Enterprise Responsibility for Personal Injury: Reporter's Study* 255 (1991) (reliance on corporate defendant's wealth "cannot be justified even by the rationale of economic deterrence, let alone retributive punishment.").

Here, Plaintiffs were permitted to introduce evidence of DCC's wealth and financial condition. 11/23 Tr. 55-60. The jury was instructed that it "must" base the award on wealth. 11/23 Tr. 34 (instruction). And in closing argument, Plaintiffs' counsel repeatedly hammered the theme that a substantial punitive damage award was necessary to "send a message" to a "wealthy" corporation. *See, e.g.*, 11/23 Tr. 41 (arguing that the alleged net worth of DaimlerChrysler AG is "the primary evidence" relevant to punitive damages and contending that "DaimlerChrysler AG has a net worth of shareholders equity of $42 billion" and Chrysler Group "in the first nine months of this year had an operating profit of $1.2 billion"); *id.* at 187 (arguing that "defendant's net worth and financial condition" is important factor). Even if the use of wealth evidence is permissible under Tennessee law, it is forbidden as a matter of federal constitutional law.[16]

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[16] The admission of the financial data violated DCC's due process and Sixth Amendment right to confront witnesses, in that DCC had no witness to question and cross-examine.

The fact that the award was based on the purported wealth of DaimlerChrysler AG is an additional due process violation. DaimlerChrysler AG is a separate and independent German corporation only indirectly related to DCC.[17] DaimlerChrysler AG is not a party to this lawsuit and the information in its financial statement includes revenues of many affiliated corporations other than DCC. The wealth of this corporation is irrelevant and should not have been allowed to furnish the basis for the punitive damage award.

Second, Plaintiffs were improperly permitted to introduce evidence and make arguments concerning extraterritorial conduct by DCC in support of a large punitive damage award. In *State Farm*, the Court emphasized that the Due Process and Commerce Clauses impose *territorial* limitations on punitive damage awards. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 422. Thus a jury "may not use

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[17] DCC (a Delaware corporation that was formerly known as Chrysler Corporation) is a subsidiary of DaimlerChrysler Motors Company, L.L.C. (a Delaware limited liability company), which is, in turn, a subsidiary of DaimlerChrysler North America Holding Corporation (also a Delaware corporation), which is owned by DaimlerChrysler AG (an Aktiengesellschaft, or German public stock corporation). Thus, DCC has only an indirect relationship with DaimlerChrysler AG, and the two companies are separate, independent and distinct legal entities.

evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction." *Id.* at 421. *Accord Lien v. Couch*, 993 S.W.2d 53, 57 (Tenn. Ct. App. 1998) ("Tennessee cannot demand that its laws be given extraterritorial effect") (citing *Gore*).

These limitations were repeatedly violated in this case. As discussed above, Plaintiffs introduced large quantities of evidence and testimony concerning alleged incidents that occurred in other States or even other countries. *See* Part I(b) *supra*; PX976 (McCloskey—Ottawa, Canada). Plaintiffs also introduced evidence concerning the revenues of DaimlerChrysler AG, which reflect the profits from the company's *worldwide* sales and business activities. 11/23 Tr. 54-59. And Plaintiffs urged the jury to displace NHTSA and impose a punishment that was nationwide in scope and would vindicate the rights of "all Americans." 11/23 Tr. 191. This evidence and argument demonstrates that the punitive damage award in this case was based on DCC's conduct throughout the United States and the world, not just within the State of Tennessee, in violation of the Due Process Clause and the Commerce Clause of the United States Constitution.

The extraterritorial nature of the punishment is evident in the fact that the jury apparently calculated the punitive damage award of $98 million based on the amount of money per vehicle DCC purportedly "saved" by not adopting Plaintiffs' preferred design, multiplied by the number of similar

vehicles sold nationally over a span of 20 years. *See* 11/23 Tr. 204-05 (Plaintiffs' Phase II closing argument) ("They say there were 7 million minivans altogether. But if it is $14 minimum more cost to put in dual recliner[s] and you start multiplying it by millions of minivans, that mounts up pretty quickly."). Even assuming that punitive damages could be imposed on this basis (they cannot), the proper "baseline" would have been the number of similar vehicles sold in Tennessee.

Third, the Court erred by rejecting DCC's proposed jury instruction that any decision to impose punitive damages must be based solely on harm to the Plaintiffs. 11/17 Tr. 213. In its reprehensibility discussion, the *State Farm* Court held that a punitive damage award may not be based on evidence and arguments concerning alleged harm to third-party individuals not before the Court. Rather, a punitive damage award must be strictly limited to punishing the defendant for the harm caused to the plaintiff in the case at bar: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423.

In closing argument, Plaintiffs' counsel urged the jury to impose a large punitive sanction based on the alleged harm to individuals other than the Plaintiffs. *See, e.g.*, 11/23 Tr. 39 ("the line of victims that [recedes] 20 years into the past . . . . continues on into the future."); *id.* at 190 ("most of the victims you've heard about . . . who were killed and injured were in NS vehicles"). This by itself was error, and violated *State Farm*. But at a minimum, DCC was entitled to an instruction informing the jury that

punitive damages could not be imposed to vindicate the rights of these other individuals, but must be strictly limited to the harm suffered by Plaintiffs.

5. The Jury Was Inflamed By The Improper Arguments Of Plaintiffs' Counsel And Acted From Passion And Prejudice.

This Court should order a new trial because the $98 million punitive damage award is so excessive and irrational as to indicate that the jury acted with bias, passion, and prejudice. *See, e.g., Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) ("no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added). That the verdict was tainted by passion and prejudice is hardly surprising in light of Plaintiffs' counsel's many improper appeals to the jury, the large quantities of irrelevant and highly prejudicial evidence discussed above, and the Court's refusal to permit DCC to show the jury why it chose the design it did. From beginning to end, Plaintiffs' counsel inflamed and prejudiced the jury with clearly improper arguments and exhortations. These tactics produced the tainted and unsupportable verdict. *See Guess v. Maury*, 726 S.W.2d 906, 913-18 (Tenn. Ct. App. 1986) (surveying cases reversed because of counsel's misconduct, and ordering new trial because of "inflammatory and prejudicial" closing argument).

a. "Send a message" arguments

Over DCC's objection, Plaintiffs' counsel inflamed the jury with explicit "send a message" arguments, urging the jury to "get the word out" to "all Americans," and "wake [DCC] up" through a massive punitive damage award that "hits [DCC] where it hurts."

These arguments pervaded Plaintiffs' closing arguments in both Phase 1 and 2. *See, e.g.*, 11/18 Tr. 66-67 ("The only thing that will stop it is a verdict that hits them where it hurts."); 11/18 Tr. 92 ("Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages."); 11/18 Tr. 149-50 ("get the message to them" through a substantial punitive damage award); 11/18 Tr. 151 ("[t]he sad truth is the only way to stop this kind of conduct is punitive [damages]. . . . This is a story that needs to get out."); 11/23 Tr. 194 ("The warning has got to be communicated to everybody for it to be effective to all Americans who own or might ever ride in or put a child in one of these minivans. Since DaimlerChrysler will not warn anybody, it is up to you."); 11/23 Tr. 192 ("it is important that you return a verdict that will get the word out"); 11/23 Tr. 208 ("We ask that you drop the hammer on them and that you render a verdict that . . . gets the word out.").

Urging a jury to impose punitive damages in order to "send a message" or "get the word out" is highly improper. Such exhortations are inherently prejudicial because they pit local jurors against a large, out-of-state corporation, and invite jurors to impose quasi-criminal punishment based on passion and prejudice. *See, e.g.*, *Pullen v. Textron, Inc.*, 845 S.W.2d 777, 779-80 (Tenn. Ct. App. 1992) (vacating punitive damage award because "[t]he jury was told to 'send a message to [the defendant] with punitive damages' and was asked to 'make the fine large enough that it hurts'"); *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) ("It is true that an 'us-against-them' plea can have no appeal other than prejudice by pitting 'the community' against a

nonresident corporation [and] is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict.'") (citation omitted); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985) ("Our condemnation of a 'community conscience' argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders.").

Such exhortations—notably the invitation to send a message to "all Americans"—also violate *State Farm*'s prohibition on extraterritorial punishment. *See, e.g.*, *White v. Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002) (reversing punitive damages award because "Plaintiffs' attorney repeated . . . his 'send them a message' argument. . . . The entire thrust of the argument was that this Nevada jury now should vindicate the interests of all Ford truck owners everywhere with a verdict that would make the front page of every newspaper in the country. . . . With this evidence and argument, . . . we cannot conclude . . . [that] the jury plainly was vindicating only [Nevada's] interest in protecting its citizens or that it was addressing Ford's reprehensibility only in the case at bar."); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 754 (2003) (plaintiff's argument that jury should return verdict that would get "publicity" is "impermissible under *State Farm*").

b. Litigation strategy and "absent" corporate representatives

In *State Farm*, the Supreme Court held that a jury's decision to impose punitive damages must

remain tightly focused on the underlying tort, and may not be based on "acts . . . independent from the acts upon which liability was premised." 538 U.S. at 422-23 ("[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"). In other words, "the conduct that harmed [the plaintiffs] *is the only conduct relevant*" to a punitive damages determination. *Id.* at 424 (emphasis added).

Thus, punitive damages may not be based on a defendant's litigation strategy or in-court tactics, neither of which has any bearing on "the acts upon which liability was premised." Many courts have held explicitly that "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). *See also Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002) (a defendant's "litigation positions and tactics . . . do[ ] not constitute the kind of malice, willfully wrongful conduct, gross negligence, or reckless disregard . . . for which punitive damages are properly imposed"); *Sanford v. Ektelon/Prince Sports Group, Inc.*, 1999 WL 33544436, at *4 (D. Neb. Nov. 5, 1999) (rejecting argument that "the defendants' litigation conduct is relevant to the punitive damages requested in this case," and explaining that such conduct "is not relevant, would be prejudicial, would take the jury away from the case, and will not be admissible"); *Palmer v. Ted Stevens Honda*, 193 Cal. App. 3d 530, 540 (1987) ("Not only was the admission of this

evidence of defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award.").[18]

Over DCC's objection, 11/23 Tr. 32, Plaintiffs' counsel made DCC's litigation strategy—including its decision not to call any DCC executives to testify—a key element of their punitive damage claim:

- "Remember this. Not a single executive of the DaimlerChrysler Corporation has come before you to explain their conduct, to express regret, promise to do anything or to promise to tell the public the truth about what is happening. Nobody. Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages." 11/18 Tr. 92.

- "If you've got a product out there and somebody says it is defective and killing and hurting people, and if you're not willing to bring any of your own employees to court to defend the product, that sort of says it all." 11/18 Tr. 55-56.

- "Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation." 11/18 Tr. 92.

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[18] Basing punitive damages on litigation conduct also runs afoul of the First Amendment's protection of free speech and the right to petition government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (restrictions on the types of arguments attorneys may make in court "implicate[ ] central First Amendment concerns").

- "There is nobody here from DaimlerChrysler to even hear your verdict except lawyers." 11/18 Tr. 66.

This improper and inflammatory argument continued during Phase 2, when Plaintiffs' counsel urged the jury to "drop the hammer" on DCC, through a massive punitive damages award, because of DCC's "whole attitude" during trial (*i.e.*, refusing to admit its product was defective), and because no DCC executive had traveled to Tennessee to apologize to the jury:

- "Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award. We respectfully submit that DaimlerChrysler's whole attitude has to be considered, the attitude that you saw before your verdict last week and even more particular the attitude that you've seen since that verdict." 11/23 Tr. 189.

- "[A]fter you have delivered the verdict you did yesterday, they come in and say you're wrong, we still say there is nothing wrong with our seats and we're not going to do anything about it, what do you have to do to get their attention?" 11/23 Tr. 184.

- "[A]t a time when a jury of citizens has determined that this product is defective, unreasonably dangerous, and caused the death of Joshua Flax, one would think it reasonable to expect the corporation to come in here and at least say something to convince you that you should not drop the hammer on them. What do we get from DaimlerChrysler? No remorse, no regret, no apology, no admission of anything, no promise to warn and fix." 11/23 Tr. 190.

- "Ms. Burns said that 7 and a half million dollars was punishment enough. Well, there is [a] problem[ ] with that. . . . [I]f that verdict of yesterday was enough, how do you explain their reaction today?" 11/23 Tr. 209.

Numerous courts have squarely held that *this exact argument* is improper and constitutes reversible error. For example, in *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998), plaintiffs' counsel argued: "why didn't we see someone from the national company come into this courtroom and try to explain their conduct?" and "Shame on the corporation for not sending representatives here to testify about why they don't have a policy." The court deemed this reversible error, holding that "[s]uch statements could serve no purpose other than to inflame the passions of the jury to return large awards." *Id.* *See also Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138, 1142 (6th Cir. 1969) ("[P]laintiffs' counsel in his closing argument to the jury . . . [r]efer[red] to Ward as a corporation and a large organization and plac[ed] a chair facing the jury and shout[ed] 'Where is the corporation today?'"—this conduct "was calculated to prejudice the minds of the jury against Ward."). Here too, Plaintiffs' argument had no purpose other than to inflame and prejudice the jury.

c. Telling jurors they would be personally responsible for future deaths

Plaintiffs' counsel repeatedly told the jurors that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. Counsel represented to the jurors that they bore the "immense" "burden" of "keep[ing] children out of the

hospitals and out of the morgues," and warning them that if they chose not to impose punitive damages, "there will be people dead and injured between today and then":

- "You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the morgues." 11/23 Tr. 210.

- "[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured." 11/18 Tr. 65.

- "When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?" 11/23 Tr. 207.

- "The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it." 11/18 Tr. 66.

- "[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then." 11/18 Tr. 66.

- "[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt." 11/23 Tr. 192.

- "[Y]ou can't stop all the deaths and injuries on the roadways. That's true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you." 11/18 Tr. 66.

- "Going after Stockell is not going to solve anything. It is not going to stop killing and injuring." 11/18 Tr. 85.

This highly inflammatory and manifestly improper argument tainted the verdict, prejudiced DCC, and requires a new trial.

d. Urging jurors to overrule a corrupt and ineffective NHTSA

The bookend to the preceding theme—that jurors would be personally responsible for the future deaths of children—was that the National Highway Traffic Safety Authority was corrupt and controlled by the automakers, and that it was up to the jury to regulate automobile safety in America.

- "The point is, NHTSA has closed the investigation and said we're not going to do anything. What does that mean to you and to this case. It is up to you. Nobody else is going to do anything." 11/18 Tr. 77.

- "NHTSA is not going to do anything. Maybe you can help make it happen." 11/18 Tr. 89.

- "[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you." 11/23 Tr. 183.

- "[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly is not

the National Highway Traffic Safety Administration." 11/18 Tr. 134-35.

- "The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else." 11/18 Tr. 78.

- "It is undisputed in this case that no safety agency is going to do anything about [the alleged defect]." 11/23 Tr. 38.

- "NHTSA belongs to the automakers, which is why two days ago we got that announcement." 11/18 Tr. 143.

This argument was improper for many reasons, including the fact that (as with the arguments discussed above) it was prejudicial and inflammatory. *See* 11/17 Tr. 241-43; *Guess*, 726 S.W.2d at 916-18 (vacating jury verdict because of improper argument by plaintiffs' counsel alleging a "conspiracy" between the defendant and an absent third party).

Moreover, Plaintiffs' argument violated *State Farm*'s limits on the permissible considerations that may underlie a punitive damage award. In *State Farm*, the Court condemned the plaintiffs' effort to persuade the jury to act as a national insurance regulator by imposing a large punitive damage award. The Court specifically noted that counsel had argued to the jury that "[y]ou're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses," and that "you, here, are going to be evaluating and assessing, and hopefully requiring [the defendant] to stand accountable for what it's doing across the country,

which is the purpose of punitive damages." 538 U.S. at 420. Here, just as in *State Farm*, counsel urged the jury to act as a national regulator, exhorting the jury to overrule NHTSA's purported failure to adequately regulate seatback strength, and urging the jury to impose a significant punitive damage award as a way of getting the attention of a large corporate defendant and triggering a nationwide policy change. *Accord Lien v. Couch*, 993 S.W.2d 53, 57 (Tenn. Ct. App. 1998) ("Tennessee cannot demand that its laws be given extraterritorial effect") (citing *Gore*).

This type of argument also frustrates and interferes with NHTSA's congressional mandate to regulate motor vehicle safety. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (common law tort claim preempted under Safety Act where permitting jury to impose liability would conflict with NHTSA's decision balancing numerous factors); *id.* at 871 (recognizing that "the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts"). It is also improper under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), which preempts claims of "fraud on the agency." Of course, Plaintiffs' claim of agency *corruption* is far more intrusive than the claim (preempted by *Buckman*) that a third party has victimized an agency through fraud.

* * *

b. Ratios of 26:1 are plainly unconstitutional.

State Farm establishes that the ratios of punitive to compensatory damages in this case are unconstitutional. With regard to the wrongful death claim, the punitive award of $65,500,000 is just over 26 times the compensatory award of $2,500,000. With regard to the NIED claim, the punitive award of $32,500,000 is exactly 26 times the compensatory award of $1,250,000.

In *State Farm*, the Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court further recognized that in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it had concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. The Court also emphasized that it had "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Gore*, 517 U.S. at 581). Finally, the Court held that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added).

Because the total compensatory award in this case was undeniably "substantial"—and indeed far higher than the $1 million compensatory award in *State Farm*—a 1:1 ratio is the maximum the

Constitution permits. *Cf. Pollard v. E.I. DuPont de Nemours, Inc.*, 2003 WL 23849733, at *5 (W.D. Tenn. Oct. 22, 2003) (although defendant's conduct was "reprehensible," "completely unacceptable" and "outrageous," a 2:1 ratio was the constitutional maximum permissible under *State Farm* in light of "the substantial compensatory damages" of $1.25 million); *Boerner v. Brown & Williamson Tobacco Co.*, 2005 WL 30394, at *6-7 (8th Cir. Jan. 7, 2005) (although defendant's conduct was "highly reprehensible," a 1:1 ratio is the constitutional maximum where compensatory damages are $4 million).

Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages "likely were based on a component which was duplicated in the punitive award," such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded $1.25 million for negligent infliction of emotional distress—and then an additional $6,632,653 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was based on Joshua Flax's pain and suffering rather than on lost wages. The duplication inherent in these awards warrants a further reduction.

c. The award vastly exceeds any comparable penalties.

State Farm requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards "'imposed in comparable cases.'" 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). The $98 million award in this case is more than 8 times *the combined total* of *all* prior punitive

damage awards that have survived appeal in reported cases in Tennessee state courts. The award is almost 50 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keritsis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming $2 million award). A chart summarizing these awards is attached hereto at Tab 5.

The *State Farm* Court also looked to "[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs]," and determined that the relevant sanction—a $10,000 fine for an act of fraud—was "dwarfed by the . . . punitive damages award." 538 U.S. at 428. The Court noted that it "need not dwell long on this guidepost" because it was so clear that the amount of the punishment vastly exceeded any comparable sanction. *Id.*

Here too, the relevant sanctions are dwarfed by the punitive damage award. At the time of the Caravan's design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for an entire fleet of defective vehicles. *See* 49 U.S.C. § 30165(a) (1998).

Criminal fines also provide guidance. Under Tennessee law, a corporation generally may be fined no more than $350,000 for commission of a felony. *See* Tenn. Code. Ann. § 40-35-111(c). Here, of course, DCC committed no crime, nor was it charged with a crime, and the Court in *State Farm* stated that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." 538 U.S. 428.

Yet the $98 million penalty here is 280 times the size of the maximum fine that could have been imposed against DCC had it actually been charged, tried and convicted of a felony in Tennessee and afforded all the protections of a criminal trial.

* * *

Dated: January 20, 2005.

Respectfully submitted,

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